IN THE SUPREME COURT OF NOVA SCOTIA

APPLAL DIVISION

ON APPEAL FROM
THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

DONALD MARSHALL JR.

APPELLANT

C A S E ON A P P E A L

CASE NO. VOLUME NO. PAGE

1971

S. C. No. 17800

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

— CROWN SIDE —

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

DONALD MARSHALL, Jr.

Appellant

HEARD January 31, 1972, at Halifax, before the Honourable Chief Justice McKinnon, the Honourable Mr. Justice Coffin and the Honourable Mr. Justice Cooper of the Appeal Division

OPINION September 8, 1972

COUNSEL C. M. Rosenblum, Q.C. Appellant

M. J. Veniot, Esq. Respondent

non-capital murder

section 9 (1), (2), Canada Evidence Act

1971 S. C. No. 17809

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

— CROWN SIDE —

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

DONALD MARSHALL, Jr.

Appellant

OPINION

McKINNON, C.J.N.S.:

The appellant Donald Marshall, Jr., was charged in an indictment, that he, on or about the 28th day of May, 1971, at Sydney, in the County of Cape Breton, Province of Nova Scotia, did murder Sandford William (Sandy) Seale, contrary to section 206 (2) of the Criminal Code [now 218 (2)].

After a trial by jury, presided over by Dubinsky, Jr., the appellant was found guilty and sentenced to serve a term of life imprisonment in Dorchester Penitentiary.

The grounds of appeal relied on by the appellant may be summarized as follows:

(1) that the learned trial Judge erred in law in not adequately instructing the jury on the defence evidence, and in expressing opinions which were highly prejudicial to the accused;

Pratico behind the bush. Pratico appeared to be watching something, and Chant decided to see what had drawn Pratico's attention.

They saw two men standing together and arguing in loud tones. One of the men, whom Pratico identified as the appellant Marshall, reached in his pocket and pulled out a "long shiny object" which he plunged into the "stomach" of the other, whom Pratico identified as Seale. Seale then collapsed.

Both Pratico and Chant fled the scene, but not together. In a nearby area, Chant was approached by the appellant Marshall who said, "look what they did to me" and displayed a cut on the inner part of his left forearm. M. D. Mattson, who lives at 103 Byng Avenue, overheard the conversation referred to, and called the police.

The appellant Marshall flagged down a car, and he and Chant had the operator drive to the spot where Seale was lying on the pavement of Crescent Street. Seale was taken to the Sydney City Hospital where he died as a result of his injuries on the following day, despite two surgical operations and massive blood transfusions.

According to the evidence of the appellant Marshall, he and Seale, who was a friend, were standing on the footbridge which spans two creeks in the park, when they were called to by two men who were on Crescent Street, and who wanted cigarettes or matches. The appellant and Seale walked up to the street and were met by two men dressed in long blue coats who identified themselves as priests from Manitoba. The strangers wanted to know if there were girls in

(2) that the learned trial Judge misdirected the jury on the meaning of reasonable doubt; that the evidence did not establish guilt beyond a reasonable doubt, the conviction was against the weight of evidence and was perverse;

(3) ground 3 relates to the evidence of the witnesses Pratico and Chant; also that the trial Judge did not make proper inquiry as to whether or not they understood the nature of an oath;

(4) that the learned trial Judge permitted the prosecuting officer to cross-examine the witness, Maynard Chant, before ruling that he was adverse; that the trial Judge permitted the prosecuting officer, in the absence of the jury, while the witness Chant was on the witness stand, to read the evidence he gave at the preliminary hearing, thereby conditioning him for the evidence he would give before the jury;

(5) that the trial Judge erred in instructing the jury they did not have to consider the question of manslaughter.

Briefly, the facts are that one, John Pratico, aged 16, was in the company of the deceased Seale and the appellant Marshall a very short time before Seale was stabbed. Pratico left the two men and stationed himself behind a bush in Wentworth Park, which is adjacent to Crescent Street, in Sydney, where he proceeded to consume a bottle of beer; while behind this bush, he observed Marshall and Seale.'

Maynard Chant, aged 15, was in Wentworth Park at the same time, but not in the company of Pratico. Chant had attended church in Sydney and was attempting to get home to Louisbourg after having missed his bus. He was taking a shortcut through Wentworth Park when he noticed

"Now I intend, of course, to deal with matters of law. That has been pointed out by both counsel, but I am also going to deal, to some extent, with the facts in this very important case. In a very well known murder trial some nineteen years ago, Azoulay v. The Queen, (1952) 2 S.C.R. 495, Mr. Justice Taschereau, who later became the Chief Justice of Canada, pointed out that in a jury trial the presiding Judge must - note he said 'must' - except in very rare cases where it would be needless to do so, review the substantial parts of the evidence. He must present to the jury the case for the prosecution and the theory of the defence so that they, the jury, may appreciate the more the value and the effect of the evidence and the law that is to be applied to the facts as they, the jury, find them. It is not sufficient for the whole evidence to be left simply to the jury by the Judge and say, 'There, you have heard the facts; go ahead and decide upon them and render your verdict.' The Azoulay case has been followed by many other cases in the past nineteen years in Canada. What I am getting at, Mr. Foreman, is that the pivotal points on which the prosecution bases its case and the pivotal points on which the defence stands must be clearly presented to the jury's mind by the judge."

A careful reading of the charge convinces me that the trial Judge followed closely the principles laid down in the Azoulay case.

The only issue before the Court at trial in relation to the charge against the appellant was whether or not he had committed the murder with which he was charged. His sole defence was a denial of that act, and the theory of the defence was based on his own evidence that the murder was committed by one of two strangers, who claimed to be priests from Manitoba.

the park and asked where they could find a bootlegger. According to the appellant, the older of the two men then made an unprovoked attack with a knife on Seale and the appellant, which resulted in Seale's fatal injury and the appellant being slashed on the arm.

According to the appellant Marshall, at the time of the attack, the man with the knife said that he did not like niggers or Indians. The appellant is an Indian while the deceased was a negro. The appellant said that he then fled, being in fear of his life.

Unexplained by the appellant was the meeting on Crescent Street between himself and two young people returning from a dance at the time when, according to the evidence of the appellant, the two strangers were present with him and Seale. Patricia Harris and Terrance Gushue, on their way home from the dance stopped and talked with the appellant on Crescent Street, Gushue having asked him for a light for his cigarette. Both Miss Harris and Gushue said they recognized the appellant, and there was only one other person in the vicinity, whom they could not recognize and were unable to tell whether the person was a man or a woman.

It is contended by counsel for the appellant that the whole tenor of the trial Judge's address to the jury was most favourable to the evidence presented by the Crown, and that he dealt very briefly with the evidence for the appellant, and indicated disbelief of this evidence.

Shortly after commencing his address to the jury, the learned trial Judge observed as follows:

In reviewing the evidence for the defence, the learned trial Judge read fairly extensively from the testimony of the appellant, and commented on that evidence as follows:

> "Now, gentlemen, you have to give very careful consideration to the story of the accused. I'm sure you will. As was his absolute right, he has gone on the stand and has given his version of the events that took place on that fateful night. Now contrary to what Pratico said, he said he was not in the vicinity of St. Joseph's Hall. And although he was with Mr. Seale, he had no dispute with him – those are the words I think – and he did not lay a hand on him. I repeat, he had no dispute with him and he did not lay a hand on him. And he told you how Seale came to get the injuries that he did receive. And I remind you, Mr. Foreman, that although the accused was subjected to a very vigorous and rigorous cross-examination, he adhered to his story that he told throughout. Now if you believe the version of the events that was told by Donald Marshall Jr., then it goes without saying that you must acquit him of this charge. Having gone on the stand he has become another witness in this case. You have the right to determine the credibility of him as a witness as you have the right to determine the credibility of any other witness. But you will bear in mind, Mr. Foreman – and I repeat, you will bear in mind – that Donald Marshall does not have to convince you of his innocence. He does not have to convince you of his innocence. It is the Crown, as I said over and over again, that must prove his guilt beyond a reasonable doubt. He does not have to convince you of his innocence!
>
> The Crown, of course, understandably, has attacked this story. There was some considerable discussion among counsel as to the nature of the wound that he had on his left arm, the depth of it, whether there was bleeding. Mrs. Davis said there was no bleeding, it's true. The doctor at the time –

but Maynard Chant said that at first there was no bleeding but later there was bleeding. You saw the mark on his arm there. It's a pretty prominent mark even today after a number of months. In assessing his evidence, it seems to me – this is my opinion and you do not have to take my opinion - you have to look at it in two ways, it seems to me. On the one hand you keep in mind the fact that he stood up, as I said before, to a very rigorous cross-examination by a very capable crown prosecutor. You will bear in mind that he at the time showed Maynard Chant, 'Look what they did to me.' It was then and there at that time he told Chant what was done to him. At that time he managed to stop a car and got into a car and went back to Crescent Street. I think it was Maynard Chant – your recollection would be better – who said that it was he, Donald Marshall, the accused, who flagged down a police car. And it was Donald Marshall who went to the hospital and to the police station with the police. I think you have to ask yourselves on the one hand, is that the action of a man who has just commited a crime, who will flag down a police car, who will go with the police, who will do the things that he did and who maintains the consistency of his story. Keep in mind, as I said, that he does not have to prove his innocence.

On the other hand, Mr. Foreman, gentlemen, on the other hand – in my opinion, you will have to assess very carefully the story that he told – two strangers who he says looked like priests, because they wore long coats and blue. He asked them, he said, whether they were priests and one of them said they were and said they were from Manitoba. They asked for cigarettes, smokes; they gave him the smokes. He and Seale gave smokes to these people, or he did. Then the man, one of these men asked him if there were any women and they said yes, there were lots of them in the park. And out of the blue comes this denunciation against blacks and Indians: 'I don't like niggers and I don't like Indians.' "

The trial Judge then spoke of the bigotry and hatred for different ethnic groups which still exists, and said:

> ". . . but in assessing the evidence of this witness, the accused, you ask yourselves the question, it seems to me, my opinion, at that hour – at that hour – these two men, one of them comes out suddenly with this denunciation of blacks and Indians. If you come to the conclusion that yes, it could be that there might have been somebody there that night who had that prejudice in him against – as he put it – niggers and Indians, you have to go on and ask yourselves the question, why – why. Donald Marshall and Sandy Seale who met these two strangers, who gave them cigarettes, smokes, who talked to them in a friendly way, asked them where they were from – according to Mr. Marshall's, the accused, story – where they came from; told they were from Manitoba; what were they, they were priests. Why, without the slightest gesture, without the slightest verbal attack or physical gesture, without the slightest provocation, would one of these so-called priests take out a knife and make a murderous attack on Sandy Seale, and on the accused himself. Why, one would ask in assessing the credibility of the story that he told, keeping in mind at all times that there was was no obligation on him to tell anything at any time. There is no obligation on an accused person to say anything, to prove anything. But he has gone on the stand, has given the story and you have the right to judge the credibility of the story and keeping in mind at all times that the burden – the burden – of proving that he was guilty beyond a reasonable doubt must lie upon the prosection."

In my opinion, the foregoing passages afford an adequate answer to the ground of objection that the learned trial Judge did not adequately instruct the jury on the defence evidence and the theory of

the defence. I am satisfied that he did so adequately, fairly and in a manner that was not capable of being understood by the jury as prejudicial to the accused.

The defence at trial, along with a denial of commission of the act, involved an attack on the testimony and credibility of the two eyewitnesses, Pratico and Chant. Counsel for the appellant took exception to the address of the trial Judge in respect to the following:

(a) that he emphasized repeatedly that Pratico and Chant were not in collusion with each other and they could not possibly have any motive for trumping up a story to implicate the appellant;

(b) that the trial Judge did not make mention in his address to the jury that the appellant was left handed, notwithstanding the fact that Pratico stated that the appellant had stabbed Seale with his right hand;

(c) that the trial Judge stated, "I think the criticism strictly speaking is justified", in referring to the attack on the credibility of Maynard Chant, indicating that the cross-examination of Chant did not weaken his testimony to any appreciable extent.

With respect to there being no collusion between the witnesses Pratico and Chant, the trial Judge referred to this twice during the course of his charge.

He said (at p. 274 of the transcript):

> "You will ask yourselves what possible motive, what motive, would Maynard Chant have, in telling the story implicating the accused, Donald Marshall. It seems to me – now, that's my opinion and I caution you, you do not have to accept my opinion; you do not have to accept my opinion.

> In my opinion there is not the slightest suggestion in this case that Maynard Chant was in collusion with John Pratico, that they acted in cahoots, together, to concoct a story. There's not the slighest suggestion that these two people were anywhere near one another prior to the events of that night or around that time up to the time when Chant saw Pratico, and that afterwards they got together to tell a story implicating the accused, Donald Marshall, Jr. . . . is there something there which can lead you to consider that he is a credible witness. It is up to you, gentlemen. I am just putting the picture before you."

and at p. 280:

> "Pratico said that they were arguing. Chant said they were arguing. Pratico told of the shiny object in Marshall's right hand which he plunged into Seale's stomach. The other man said the same thing. What motive would lead this young man to concoct a story, a dreadful story if untrue, to place the blame of a heinous crime on the shoulders of an innocent man? What possible motive would Pratico have to say that Donald Marshall stabbed Sandy Seale? He had been drinking. In assessing his evidence you will have to ask yourselves, is this a drunken recital or is it a recital of a drunken man, or is there a consistency which appears between the story of two eye-witnesses that night to this tragic event, eye-witnesses as to whom there is no evidence by the Crown that they got together, were in collusion to concoct the story."

It was quite proper for the trial Judge, in the circumstances, to address the above remarks to the jury. Two very important and independent eye-witnesses, with no apparent motive for collusion, and with no evidence to give the slightest support to any such suggestion,

had given to the Court mutually corroborative testimony that had a direct bearing on the very issue to be decided by the jury. It was the duty of the trial Judge to recite these facts to the jury in order to assist them in their deliberations, and as he repeatedly instructed them, the findings of fact, opinions based on facts and findings of credibility were theirs only to decide.

I am satisfied that exception cannot be taken successfully to the foregoing remarks of the learned trial Judge.

Regarding the objection that the trial Judge did not make mention to the jury the appellant was left handed, the only evidence indicating this was by the appellant himself. Whether or not he was left handed was irrelevant to the defence raised, which was a total denial of the act, and it may have confused the issue. Furthermore, under ordinary circumstances, man has effective use of both hands, whether he is right or left handed, except for such specialized tasks as writing, painting, et cetera.

As Halloran, J.A., said in the case of Rex v. Hughes et al., (1942), 78 C.C.C. 1, at pp. 15, 16:

> "The jury have a right to expect from the Judge something more than a mere repetition of the evidence. They have a right to expect that his trained legal mind will employ itself in stripping the testimony of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decision, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits."

In my opinion, under the circumstances existing, the matter of the appellant's left handedness was irrelevant and did not require comment by the trial Judge.

Counsel for the appellant also objects to that part of the Judge's charge where he said, "I think the criticism strictly speaking is justified", referring to the attack on the credibility of the Crown witness, Maynard Chant, indicating that the cross-examination of Chant did not weaken his testimony to any appreciable extent.

What the trial Judge had to say in this regard is as follows:

> "But the main attack on Mr. Chant's testimony by the defence is twofold. First of all, he failed to tell the police at the time of the incident what he told the court here. He failed to tell it that night. Secondly, he lied to the police and he said that in cross-examination according to my notes. He said that, 'They, the police didn't tell me what to say.' This was on cross-examination of Maynard Chant. 'I told them the untrue story Sunday afternoon. I told them the true story afterwards.' I think the criticism strictly speaking is justified. Strictly speaking, it's justified. [Emphasis added.] It's a fair criticism to make, that he failed to tell the police at that particular time when he saw — when the police came, he didn't say, 'There's your man who did this thing.' He didn't say it at the scene. He didn't say it at the hospital. He didn't say it at the police station. He didn't say it later. How much more credible would have been his story if indeed he had told that story at the time it happened. And he lied to the police for a while. He said they didn't coerce him into telling the story. He later told them the true story. Mr. Rosenblum says,

'you can't believe a thing that this fellow says'. Mr. Foreman, he says you can't believe – the Defence urges you to disregard the evidence of Maynard Chant, because of his inconsistencies and because of the fact that he lied and he didn't tell the story at the time.

Mr. MacNeil, on the other hand, urges you to accept his story completely as finally told. Well I told you before that it is up to you to assess the credibility of every witness. You don't have to believe everything a witness said. You can believe a part; you can believe some; you can reject – you can disregard the whole of that witness's testimony. It is up to you to determine the credibility of the witness and, of course, in this case you will have to be, in my opinion, I would instruct you, to be most careful of the evidence. You are looking at his evidence and you have to be most careful."

In my opinion, the above instruction of the learned trial Judge to the jury set out fully and fairly the evidence elicited from Chant on cross-examination. At the same time, he warned the jury to be careful in the assessment of that evidence, and repeated his instructions, with emphasis, that the question of credibility was for the jury alone. I am satisfied that this part of his charge was fair to the accused and that the trial Judge was not in error.

As to ground No. 2, counsel for the appellant contends that while the trial Judge stated a number of times that the charge must be proved beyond a reasonable doubt, in other parts of his address, he used the words "satisfied" and "to your satisfaction" and this was misdirection. Further that he did not instruct the jury that if the evidence

created a reasonable doubt, this would entitle them to acquit the accused.

The use of the words "satisfied" and "to your satisfaction" are found in the transcript pages 258 and 259, and they should be placed in proper context with the Judge's instructions immediately after his use of the words "you are satisfied that the accused is guilty beyond a reasonable doubt" and preceding the words "to your satisfaction". This part of his charge reads as follows:

> "I said before that I would deal with the question of onus or burden of proof. The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden on an accused person to prove his innocence. I repeat, there is no burden on an accused person to prove his innocence. Let me make that abundantly clear. If during the course of this trial, from beginning to end, during anything that may have been said by counsel during their speeches, that might in the slightest way be considered as suggestive of any burden on the accused to prove anything, let me tell you that there is no burden on the accused. The Crown must prove beyond a reasonable doubt that an accused is guilty of the offence with which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused committed the offence of non-capital murder, the offence with which he is charged, then it is your duty to give the accused the benefit of that doubt and to find him not guilty. In other words, if after considering all the evidence, the addresses of counsel and my charge to you, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused, Marshall, committed the offence of non-capital murder, it is your duty to give this accused the benefit of the doubt and to find him not guilty."

The learned trial Judge then proceeded to define "reasonable doubt" as an "honest doubt", a doubt which causes you to "say to yourselves, or any of you, 'I am not morally certain that he committed the offence', then that would indicate to you – that would indicate there is a doubt in your mind and it would be a reasonable doubt which prevents you from arriving at the state of mind which would require you to find a verdict of guilty against this man".

Placing the instructions of the trial Judge in their proper context, the jury could not, and were not, misled as to the proper application of the law regarding the "burden of proof".

Counsel for the appellant has cited Rex v. Megill, (1929), 51 C.C.C. 377, in support of his argument. It is my opinion, however, that this case has no application to the issue here.

Ground three relates to the evidence of the witnesses Pratico and Chant, counsel for the appellant contending that the trial Judge did not make proper inquiry as to whether either witness understood the nature of an oath.

The record indicates that the trial Judge declared himself satisfied that both Pratico, aged 16, and Chant, aged 15, understood the nature of an oath, and they were sworn without objection by the defence. This was a question of fact to be decided by the trial Judge and I can see no good reason, under the circumstances, to interfere with that finding.

Counsel for the appellant also objects to the quality and sufficiency of the evidence given by Pratico and Chant.

Pratico testified that he saw the deceased Seale and the appellant Marshall at the scene of the crime and he gave direct evidence that he saw Marshall stab Seale. He was acquainted with both men. Under a rigorous cross-examination, he admitted to drinking on the night of the stabbing. The learned trial Judge in his address to the jury reviewed this evidence and in clear language related Pratico's drinking to his credibility and left it for the jury to decide.

Regarding a conflict in his statements before and during trial, this is explained by the record which discloses that Pratico's life was threatened if he testified that the appellant stabbed Seale. The difficulty at trial was that this evidence involved conversations addressed to the witness by third parties not before the Court, and the trial Judge refused to allow such questions. However, the record on the voir dire indicates that such threats were made to the witness Pratico.

This issue of the conflicting statements by Pratico was also placed fully before the jury by the trial Judge and the determination of credibility in view of this evidence was expressly left to them.

Chant's evidence corroborated in every material particular that of the witness Pratico. He testified that he saw a person crouched in the bushes at the place where Pratico said he witnessed the stabbing. Chant, at first, declined to swear that the man who did the stabbing was the appellant Marshall, but this was inconsistent with a previous statement under oath made by him

at the preliminary hearing, which gives rise to the next ground of objection by the appellant. The Crown contends that the evidence of Pratico and Chant comprises a complete and accurate description of the crime and the circumstances under which it was committed.

Chant admitted under cross-examination that he told the police an untrue story. As referred to above, this was commented on at length by the trial Judge in his charge, and after proper instruction, the issue was left to the jury to consider.

I am satisfied that the objections under this ground should be dismissed.

Under ground No. 4, counsel for the appellant contends that when the jury was absent, the Crown prosecutor was permitted, while Chant was on the witness stand, to read the evidence he gave at the preliminary hearing, thereby conditioning him for the evidence he would give when the jury would return, this being highly improper and prejudicial to the appellant.

An examination of the trial transcript indicates that in the course of Chant's direct examination by the Crown, the prosecutor repeated several questions to which he had already received answers from the witness. On proper objection by counsel for the defence, Crown counsel indicated that he was preparing the way for an application under section 9 of the Canada Evidence Act on the ground that the witness had given a previous inconsistent statement. Directed by the Judge, the jury withdrew and the Judge heard evidence and argument which resulted in his granting permission for the Crown to cross-examine Chant on his previous inconsistent statement.

Section 9. (1) and (2) of the Evidence Act reads as follows:

"9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse."

As appears from a reading of this section, the right to cross-examination appears to be much broader under section 9. (1) than under 9. (2).

To show that the witness Chant had made a previous inconsistent statement, Crown counsel read from the transcript of the preliminary hearing to indicate that his evidence there was inconsistent with the evidence he was giving at trial.

At the conclusion of the recital of evidence taken at the hearing and argument, the trial Judge said:

"I have to satisfy myself, Mr. Rosenblum, if this witness in my opinion proves adverse – by leave of the court may prove that the witness made at other times a statement inconsistent with his present testimony. Has he made a statement inconsistent with his present testimony?

Mr. Rosenblum:
Not in my opinion, no!

The Court:
I regret that I differ with you.

. . .

I will allow you to draw – in the presence of the jury when they return – to draw the testimony that this witness gave in the court below, read it to him and then ask him if he said that, and if it is true."

It will be noted that although the trial Judge did not expressly state the witness was adverse, there can be no doubt that, in his opinion, the witness had been proven to be adverse.

This is substantiated by the Judge's remarks at the conclusion of the Crown prosecutor's examination and before cross-examination. He said:

"I would not have permitted Mr. MacNeil to read these questions if I did not in my opinion consider that by his contradiction, . . . from the evidence that he gave previously with the evidence that he gave in the court below that to that extent he was adverse and I gave leave to the Crown to prove that the witness made at other times a statement inconsistent with the testimony he gave this afternoon, but before such last mentioned proof can be given, circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such a statement. And that's my ruling!"

If by the above remarks of the trial Judge, he indicated that he did not make his finding of adversity until after hearing him cross-examined on the witness's previous statement, then it would appear that his finding was not in accord with section 9. (1) of the Evidence Act. Under section 9. (2), it is not required that the witness should be found adverse, and where it is claimed that the witness has made an inconsistent statement, cross-examination may be permitted, but Crown counsel is limited to cross-examination on the inconsistent statement in accordance with the provisions of section 9. (2). In the instant case, the cross-examination remained within the limits prescribed by section 9. (2), and if there was an error in the application of the section, no substantial wrong or miscarriage of justice resulted, and I would apply the provisions of section 613 (1) (b) (iii) of the Code.

The appellant's counsel also contends that it was improper for the prosecuting officer to read Chant's evidence, taken in the Court below, to the Judge in the presence of Chant, but in the absence of the jury.

The purpose of reading the prior testimony of Chant by the Crown prosecutor was to support the Crown's contention to the trial Judge that the witness had given inconsistent testimony at the preliminary hearing. The jury had been sent out of the courtroom during this exercise, and at no time was there any suggestion by counsel for the appellant that the witness Chant should be removed from the courtroom or that the Judge read from the preliminary transcript in silence until the issue was determined. It does not appear to me that the appellant suffered any prejudice through Chant hearing the evidence

he had previously given, for when the jury returned, the same evidence was read to him question by question.

Accordingly, I am of the opinion that the objection under ground 4 should be dismissed.

The final ground of appeal is that the trial Judge advised the jury their verdict was limited to "guilty" or "not guilty" of murder, and that they did not have to consider a verdict of manslaughter, although there was evidence that the deceased Seale had put up his fists.

In his instructions to the jury, the trial Judge included the following:

> "My opinion is that whoever caused these wounds committed non-capital murder. . . . the facts in this case as they came before you, gentlemen of the jury, from beginning of the case to the end, do <u>not</u> give rise to your having to consider the crime of manslaughter . . .
>
> Now Mr. Foreman, the defence in this case is not self-defence. This is not a case of self-defence. This is a complete denial. The defence is, I didn't do it – complete denial! Not self-defence but even if it were self-defence, I would have to instruct you that if that were the evidence, the late Mr. Seale put up his fists, then to strike him with an instrument and stab him was something that would go far, far beyond the right of self-defence. That sort of defence would not be commensurate with the other man's act. That issue does not arise here because as I said, the defence here is a complete denial."

There was no suggestion at any time during trial by counsel for the appellant that the verdict of manslaughter should be left with the jury. I accept the Crown's contention that what the appellant now seeks is to completely discard the line of defence followed at the trial and argue that the trial Judge should have told the jury that they might disbelieve substantially the whole of the evidence tendered by the Crown; that they might also disbelieve the appellant's evidence and find that the appellant stabbed Seale, but did so, in self-defence or as a result of provocation.

I am satisfied that the instruction of the learned trial Judge excluding manslaughter from consideration by the Jury was, on the evidence, a proper direction to place before them.

It is my opinion that the appeal should be dismissed.

DATED at Halifax, Nova Scotia, this 8th day of September, A. D., 1972.

C.J.N.S.

1971 S. C. No. 17800

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

— CROWN SIDE —

BETWEEN:

THE QUEEN)
) OPINION OF
v.)
) McKINNON, C.J.N.S.
D. MARSHALL, Jr.)

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

HER MAJESTY THE QUEEN

RESPONDENT

- and -

DONALD MARSHALL, JR.

APPELLANT

FACTUM OF APPELLANT

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STATEMENT OF FACTS

The Appellant, Donald Marshall, Jr., was charged with murdering Sandford William (Sandy) Seale on May 28th, 1971, at Sydney, Nova Scotia, contrary to Section 206 (2) of the Criminal Code of Canada.

The trial was held before His Lordship, Mr. Justice J. L. Dubinsky, with a Jury, on November 2nd, 3rd, 4th and 5th, 1971, and the Jury brought in a verdict of "Guilty" after deliberating four hours, following which the Appellant was sentenced to serve life imprisonment at Dorchester Penitentiary.

The case for the Crown depended practically entirely upon the evidence of Maynard Chant, age 15 years, and John L. Pratico, age 16 years, both of whom testified that they were in Wentworth Park, but not in each other's company, late in the evening of May 28th, 1971, and observed Donald Marshall, Jr., and Sandy Seale standing and arguing with each other, with their hands up, and that Marshall pulled a shiny object out of his pocket and plunged it into the stomach of Seale, following which Seale collapsed to the ground.

The Appellant, an Indian, in his testimony, stated that he was in Wentworth Park on the occasion in question with Sandy Seale, a Negro, when they were met by two men

unknown to them, and that after some conversation with them, one of the men stated that he did not like Indians or niggers and that he stabbed Seale, and slashed Marshall's arm. The Appellant testified that he had no quarrel of any kind with Seale and following the incident he ran for help and met Chant on Byng Avenue, a short distance from the Park, where Marshall told Chant what had happened to his friend, Seale, and showed Chant the wound on his arm, which was then bleeding. The Appellant then succeeded in stopping a motorist who took him and Chant back to the scene, at which time the Police and others, including the ambulance driver, arrived. Maynard Chant did not accuse the Appellant of having committed the crime, nor did he make any such accusation to any of the numerous other people he met that evening, including the Police, and he says he lied to the Police when they questioned him for days afterward, such falsehood being apparently that Marshall did not commit the offence.

Maynard Chant, age 15 years, was attending Grade VII in school at Louisbourg. He failed in Grades II, V and VI and repeated these years in school (see line 1, page 107). No inquiry was made by the Trial Judge as to whether or not he understood the nature of an oath, though

such an inquiry was made before Patricia Harris was sworn (see pages 74 and 75).

John L. Pratico, age 16 years, was permitted to be sworn although on page 118 of the Evidence it is noted that the Court questioned Mr. Pratico before he was sworn. There is no record of the questions put to the witness by the Judge. Pratico told a number of people, including Mary Paul and Tom Christmas, that the Appellant did not commit the crime, and before being called to the witness stand, he repeated this remark in the presence of Sheriff James MacKillop, Detective Sgt. John MacIntyre and associate Defence Counsel, S. J. Khattar, Q.C.

Other witnesses called by the Crown included Dr. M. Naqvi and Dr. David Camm, who attended the deceased at the hospital; Sandra Wrazek and Adolphus J. Evers, of the Crime Laboratory of the R. C. M. Police, who testified concerning blood found on a jacket worn by the Appellant; Dr. M. S. Virick and Mrs. Merle F. Davis, who examined the slash on the Appellant's arm; Patricia Harris and Terrance Gushue, who met the Appellant in the Park when they were walking from the dance at St. Joseph's Parish Hall to Miss Harris' home. Sgt. Michael MacDonald, of the Sydney Police Force, also testified concerning his meetings with the Appellant and with Maynard Chant.

BRIEF OF ARGUMENT

As to Grounds of Appeal 1, 2 and 7:

The whole tenor of the Judge's address to the Jury was most favourable to the evidence presented by the Crown and dealt very briefly with the evidence of the Appellant, and indicated his disbelief of the evidence given by the Appellant (See Page 285).

It is submitted that the Trial Judge in his address to the Jury emphasized repeatedly that Pratico and Chant were not in collusion with each other and that they could not possibly have had any motive for trumping up a story to implicate the Appellant (See Pages 275 and 279).

The Trial Judge did not make mention in his address to the Jury that the Appellant is left handed (See Page 186) notwithstanding the fact that Pratico stated that the Appellant stabbed Seale with his right hand (See Page 123).

On Page 273, the Judge stated, "I think the criticism strictly speaking is justified", in referring to the attack on the credibility of Maynard Chant, indicating

that the cross-examination of Chant did not weaken his testimony to any appreciable extent.

As to Ground 3:

The Judge stated a number of times that the charge must be proved beyond a reasonable doubt; but he also used the words "satisfied" (See Page 258) and "to your satisfaction" (See Page 259); and it is submitted that this is misdirection causing substantial injustice (See R. vs. Pegill 31 C.C.C. 377) (See Pages 258 and 259).

Although the Judge stated that the Appellant did not have to convince the Jury of his innocence, he did not state that if such evidence created a reasonable doubt, that this would entitle the Jury to find a verdict of acquittal (See Page 283).

As to Grounds 4 and 5:

The Crown evidence depended entirely on the testimony of Pratico and Chant.

Dealing with Pratico, age 16, and who was permitted to be sworn following questioning by the Judge, but there is no record of such line of questioning.

Pratico commenced drinking early in the morning (See Page 138) and continued drinking all day and evening (See Page 139), so that he became sick at St. Joseph's Hall (See Page 140) as a result of drinking a mixture of wine and beer. He was drinking beer when he was hiding behind a bush in the Park when he allegedly saw the crime being committed (See Page 121). He told a number of people, including Mary Paul and Tom Christmas, before the date of trial that the Appellant did not commit the crime (See Page 148) and on the day of the Trial before being called to the witness stand, he told the same thing to S. J. Khattar, Q.C. and Sheriff James MacKillop (See Page 148).

As to Maynard Chant, age 15, there was no inquiry as to whether or not he understood the nature of an Oath, (See Page 86), but there was such an inquiry by the Judge before Patricia Harris, age 14 years, was sworn (Page 74).

Chant, 15 years of age, was in Grade VII in school and had repeated Grades II, V and VI. He met the Appellant on Byng Avenue after Seale was stabbed, and

and accompanied him in a car with other people to return to the scene of the crime. He did not make any accusation against the Appellant, to the Appellant, or to anyone else, including the ambulance driver, Leo Curry, the Police and the others who were present at that time. (See Page 109-111-114). He did not make any such accusation to the Police for three days following the night of the fatality; and on Page 109, he was not certain that the Appellant was the man that he saw stab Seale.

Pratico's reason for making statements to the effect that the Appellant did not commit the crime was that he was in fear, and Chant gives the same reason, though there is no evidence to substantiate any such fear.

As to Ground 11:

(See Pages 96-102) When the Jury was absent, the Prosecuting Officer was permitted, while Chant was on the witness stand, to read the evidence he gave at the Preliminary Hearing, thereby conditioning him for the evidence he would give when the Jury would return. It is submitted that this was highly improper and prejudicial to the Appellant.

CANADA
PROVINCE OF NOVA SCOTIA

IN THE SUPREME COURT
APPEAL DIVISION - CROWN SIDE

HER MAJESTY THE QUEEN

RESPONDENT

versus

DONALD MARSHALL, JUNIOR

APPELLANT

FACTUM OF THE RESPONDENT

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STATEMENT OF FACTS

The Appellant was convicted on November 5, 1971 of the non-capital murder of one Sanford (Sandy) Seale, after a trial before His Lordship Mr. Justice J.L. Dubinsky with a jury at Sydney, Nova Scotia.

Seale received the wound from which he died on the 28th of May, 1971.

The case against Marshall turned on the evidence of Maynard Chant and John Pratico. Pratico, aged 16, was in the company of Seale and Marshall a few minutes before Seale was stabbed. Pratico left the couple and stationed himself behind a bush in Wentworth park just off Crescent Street in Sydney, where he proceeded to consume a bottle of beer. While he was behind the bush, Marshall and Seale came into his view. His identification of both was positive.

Chant, aged 15, was in Wentworth Park, at the relevant time, but not in the company of Pratico. Chant was attempting to get home to Louisbourg after having missed his bus, and took a short cut through the park, when he noticed Pratico behind a bush. Since Pratico appeared to be watching something, he too, stopped to observe.

Two men, Seale and Marshall were standing together talking in loud tones. One of the men whom the witness Pratico identified as Marshall, reached in his pocket and pulled out something long and shiny and plunged it into the abdomen of the other, identified by Pratico as Seale. Seale then collapsed.

Both witnesses fled the scene. Chant, a few minutes later was approached by Marshall, in an area close to the incident, who said

"Look what they did to me" and displayed a cut on his arm. The accused then flagged down a car, and Chant and Marshall accompanied the driver to the spot where Seale was lying on the pavement. Seale was taken to Sydney Hospital where he died as a result of his injuries the following day, despite surgery and massive blood transfusions.

Marshall's evidence was to the effect that he and Seale were friends, that he had no quarrel with Seale, and that he did not harm him in any way. His explanation of what had occurred was that he and Seale were approached by two men they had never seen before. Some conversation then occurred during which the two men identified themselves as priests from Manitoba; indicated that they were interested in knowing if there were any girls in the park, and asked where they could find a bootlegger. The older of the two men, according to Marshall then made an unprovoked knife attack on Seale and the accused, which resulted in Seale receiving his fatal injury and in the accused being slashed on the arm. The attack was accompanied or preceded by an assertion by the unidentified man welding the knife that he did not like niggers or Indians. Marshall is an Indian; Seale was a Negro. At this point, Marshall fled.

From this point there appears to be no major conflict between defence and crown evidence.

PART II

POINTS IN ISSUE

The Attorney General appears on behalf of Her Majesty the Queen and says that the points in issue on this appeal are those raised in the notice of appeal on file herein.

For the sake of convenience, certain of the grounds of appeal are argued together. Argument on certain others will be presented orally at the hearing of the appeal if the court so desires.

ARGUMENT ON THE FIRST, SECOND, SEVENTH AND TWELFTH GROUNDS OF APPEAL

First Ground of Appeal:
"THAT the Learned Trial Judge erred by not adequately instructing the Jury on the defence evidence".

Second Ground of Appeal:
"THAT the Learned Trial Judge erred in his charge to the Jury in that he gave his own opinion on certain aspects of the evidence which opinion was highly prejudicial to the accused".

Seventh Ground of Appeal:
"THAT the Learned Trial Judge misdirected the Jury in that the charge of the Learned Trial Judge was capable of being understood by the Jury as being prejudicial to the accused".

These grounds of appeal are dealt with together since they relate to the treatment accorded the evidence offered by or for the Appellant.

Under ground 12, the Appellant also raises the question of the exclusion of the verdict of manslaughter, and implies that this was a verdict which should have been left to the jury. Since this, it is submitted relates to the theory of the defence, it is dealt with here.

The only evidence called by the defence was that of the accused Marshall. The direct examination of Marshall is reproduced at pages 186-193 of the case on appeal. The cross examination is found at pages 193-216.

The theory of the defence was a simple denial of having committed the act. It consisted entirely of the Appellant Marshall's testimony that he and the deceased, Seale, had encountered two men on Crescent Street in Sydney. According to Marshall, a brief conversation followed (see pp. 189, 190 of the Case), at the end of which the older of the two men produced a knife from his pocket and "drove it into Seale", and, swinging around to Marshall, slashed Marshall's left arm.

This unprovoked attack, according to Marshall, was accompanied by, or immediately preceded by (it is not clear from the transcript - see p. 190-191) an assertion from the man holding the knife that he didn't like "niggers or Indians". Marshall is an Indian; Seale was a Negro. Following this, Marshall ran for help (see p. 191).

From this point, there is not much conflict between the evidence of Marshall and that of the Crown witnesses. The case turns on what happened on Crescent Street and in nearby Wentworth Park.

The law on the duty of a trial judge to properly instruct the jury on the theory of the defence seems reasonably clear.

In the leading case of Leon Azoulay v. Her Majesty the Queen (1952) S.C.R. 495, Taschereau, J. said at p. 499:

> The Rule which has been laid down, and consistently followed is that in a jury trial, the presiding Judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them ...

The same principle was stated in a slightly different fashion by Kellock, J. in the case of Henderson v. The King (1948), 91 C.C.C. 97 (Sup. Ct. Can.) at page 112:

> It is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury ...

The theory of the defence of necessity will qualify the nature of the charge to the jury. In this case it is clear from all the evidence that Seale was unlawfully slain. The Crown's case depended to a large degree on the testimony of two eyewitnesses, Chant and Pratico. They

testified that they had seen Marshall commit the crime. See case at pp. 90,97,99, 101 (questioned by the Court) 103-107, 108, 109, 117 for the evidence of Chant on this matter; see pp. 122-123, 135-138, 146-148 for the evidence of Pratico on this point).

The defence rested solely on a denial of the actus of the crime, and was developed along two main lines of approach.

The first was an attack on the testimony and credibility of the witnesses Chant and Pratico; the second consisted of direct testimony by the Appellant which, under any reasonable construction of its effect, could not stand with the evidence of Chant and Practico. The two versions of what happened are irreconcilable.

It was unquestionably the duty of the trial judge to instruct the jury on the evidence of the defence on the issues raised in relation to the charge. In the case of Kelsey v. The Queen (1953), 105 C.C.C. 97, Fauteaux, J. (as he then was) said at p. 103:

> It is, of course, unnecessary that the jury's attention be directed to all of the evidence, and how far a trial Judge should go in discussing it must depend in each case upon the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial. In the words of Goddard L.C.J. in Clayton-Wright (1948), 33 Cr. App. R. 22 at 29:
> 'The duty of the Judge ... is adequately and properly performed ... if he puts before the jury clearly and fairly the contentions on either side, omitting nothing from his charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give ... a fair picture of the defence, but that does not mean to say that he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given by experts or anyone else'.
>
> The rule is simple and implements the fundamental principle that an accused is entitled to a fair trial, to make a full answer and defence to the charge, and to these ends, the jury must be adequately instructed as to what his defence is by the trial Judge ...
> (emphasis in original)

It is respectfully submitted that only one issue arose in relation to the charge against Marshall and that was whether or not he had committed the act with which he was charged. His sole defence was a denial of that act. It is further submitted that the trial judge properly addressed himself to the defence offered (see p. 279) and properly instructed the jury thereon.

In the case of Chant, at pp. 268-271,272 of the case of the trial judge read back to the jury portions of Chant's evidence. At page 273-274, the trial judge in his charge fully and fairly set out the information elicited from Chant on corss examination, and related this directly to the credibility of the witness. At the same time, however, the learned trial judge repeatedly instructed the jury that the question of credibility was for the jury alone.

With respect to the evidence of the witness Pratico, it is submitted that the trial judge charge was unexceptionable in law. As in the case of Chant, His Lordship read back portions of the direct examination of Pratico to the jury. (See pp. 275-277). There followed immediately an accurate summary of the evidence on cross examination, bringing to the attention of the jury the condition of the witness at the material times, his statements subsequent to the event, some of which were inconsistent with his testimony before the Court, and the necessity for jury to come to their own decision with respect to the credibility of the witness.

Counsel for the Appellant submits that the trial judge "emphasized repeatedly that Pratico and Chant were not in collusion", and that therefore there could not be a motive for concocting a story to implicate the Appellant.

The Attorney General says that this occurred in only two places in the charge (see pp. 275, 279) and that it was plain from the evidence that the two were independent observers of the incident that gave rise to the charge since they were not in each other's company when they witnessed the incident. It is further submitted that it was proper in these circumstances for the trial judge to direct the attention of the jury to the fact that two vitally important and independent eyewitnesses with no apparent motive for collusion, had provided the court with mutually corroborative testimony that had a direct bearing on the very question to be answered by the jury. The trial judge did nothing more than this.

Having told the jury, as he repeatedly did throughout the charge, that they were to be the judges of fact, the trial judge as part of his function should put the facts in such a way as to assist the jury in coming to its conclusion. See Rex v. MacKenzie (1932) 58 C.C.C. 106 at 115 (B.C.C.A.); The Queen v. Henry Dowsey (1865) 6 N.S.R. 93 (N.S. Sup. Ct. in banco).

This principle, it is submitted, has added force in this case, since the sole defence raised was a complete denial of the act and the evidence in question was that of two eyewitnesses to the act. His statements expressed something which was apparent from the evidence of the two witnesses and it is submitted that taken in the context in which they appeared, the statements were fair and proper and in no way prejudicial to the Appellant.

The evidence of the Appellant was considered at length by the trial judge. The charge to the jury occupies some thirty five pages, from page 252 of the case until page 287. His Lordship commenced a

consideration of the evidence in the trial at page 266. Of the 21 pages of the charge devoted to a consideration of the evidence, five were concerned directly with the evidence of the Appellant. Approximately two pages are given over to a reading of the testimony of the Appellant on direct examination. The remainder is devoted to a consideration of this evidence.

His Lordship in this pursuit, generally set forth the effect of the evidence in a full and fair manner, and specifically

(a) pointed out that the story of the accused had withstood a "very vigorous and rigorous cross examination" (p. 283, lines 15-17, p. 284, lines 5-9);

(b) told the jury that if they accepted the version of the events told by Marshall that they "must" acquit him of this charge (p. 283, lines 17-19);

(c) told the jury that they must evaluate the credibility of the Appellant, but that the accused bore no burden of proving his innocence (p. 283, lines 20-28);

(d) indicated to the jury that they might well find that his actions, which were enumerated, following the stabbing of Seale were actions that were inconsistent with the actions of a man who had just committed murder (p. 284, lines 5-20).

In addition to this, the trial judge pointed out the other inferences that might be drawn from the same statements, referring repeatedly to the duty of the jury to find on facts and credibility against the background of the presumption of innocence, and the rule that the burden of proof beyond a reasonable doubt rests always on the Crown.

It is submitted specifically by Counsel for the Appellant that the trial judge indicated his disbelief of the evidence given by the Appellant (at page 285).

The Attorney General says that this is a misreading of that portion of the charge and further says that even if it were not, that the trial judge is entitled to comment on the evidence in such a manner.

After referring to the responsibility of the jury to determine credibility, and to assess the evidence of the Appellant, His Lordship pointed out to the jury the obvious questions which would arise on a consideration of the version of events given by the Appellant and indicated that they should be considered by the jury in assessing the credibility of the Appellant. There is nothing expressed in the charge that can be construed as an expression of personal opinion on the part of the trial judge to the effect that he disbelieved the evidence of the Appellant. When the charge as respects the evidence of the Appellant is taken as a whole, it is submitted that it displays a balanced approach to a clearcut issue and is unobjectionable in law.

At most, if the passage referred to at p. 285 by the Appellant is considered out of context, it might be said that the trial judge was in so many words expressing an opinion that the Appellant's story was an unlikely one. This, however, is a proper function for the trial judge to assume. In the case of Leo George O'Donnell (1917) 12 Cr. App. R. 219, Lord Reading said at p. 221 with respect to a contention that the trial judge had indicated so strongly his view of the case that it could not be said that he left those facts to the jury:

> ... it is sufficient to say, as this court has said on many occasions, that a judge when directing a jury is clearly entitled his opinion on the facts of the case provided that he leaves the issue of facts to the jury to determine. A judge obviously is not justified in directing a jury or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way in which he indicates; but he may express a view that the facts ought to be dealt with in a particular

> way, or are not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, but that it differs from accounts which he has given of the same matter on other occasions.

It is submitted that there is nothing in the charge of the trial judge which can be construed as a direction to find the facts as the trial judge indicates. In words that occupy almost four pages (pp. 255-258) of the charge, the trial judge repeatedly charged the jurors that the facts and inferences from facts, credibility and assessment of witnesses, were their responsibility and theirs alone. They were further instructed in clear terms to use and prefer their own judgement and recollection to that of the judge and not to be bound by opinions or facts expressed by the Judge.

It is further objected by Counsel for the Appellant that the trial judge did not mention in his charge that the Appellant was left handed notwithstanding the fact that Pratico stated (p. 123) that the Appellant stabbed Seale with his right hand.

In the case of Rex v. Hughes et al. (1942) 78 C.C.C. 1, (B.C.C.A.) O'Halloran, J.A. said at p. 15-16:

> Allied to this phase of the appeal is a question which arose during the argument concerning the Judge's duty in directing the jury's attention to the evidence and in placing defences before the jury. It must be exceedingly rare indeed where it is the Judge's duty to refer to all the evidence of every witness. As was said in R. v. Roberts, each Judge should be left to sum up a case in his own way so long as he does not misdirect the jury in law or in fact. But that does not absolve the Judge from presenting to the Jury the material evidence related to the case for the prosecution and the defence respectively.

> The jury have a right to expect from the Judge something more than a mere repetition of the evidence. They have a right to expect that his trained legal mind will employ itself in stripping the testimony of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decision, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits...

Reference should also be made to the passage from Kelsey v. The Queen, supra in this connection. The evidence to which the attention of the jury is drawn must in the words of Fauteaux, J., "depend in each case on the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial".

There was no necessity that the trial judge mention the fact that Marshall was left handed. In point of fact, the matter was completely irrelevant to the defence raised and might in fact have confused the issue.

Since Marshall denied the act, the fact that he was right or left handed is irrelevant. It was clear from the evidence of Chant and Pratico (see pp. 90 and 122-23, 146 respectively) that only two men were involved in the incident they witnessed. If their evidence had been to the effect that Seale had been stabbed by one of several men assembled, then the fact that the knife welder had used his right hand, taken in conjunction with Marshall's self-professed left-handedness, might have some significance if identity were a problem. This however, is not the case.

The issue of the identity of the person who committed the crime is raised solely by the testimony of the accused. The evidence of Chant and Pratico is that they witnessed the stabbing of Seale and that Marshall was the man who stabbed him. Their evidence does not raise the issue of identity. The fact that Seale was stabbed by a person using his right hand in these circumstances, is of no consequence, and need not have

concerned the trial judge.

The Appellant assumed the risk of explaining away the death in relating what according to him, had taken place, for the advancement of his defence of denial.

If the issue was properly left to the jury, these grounds of appeal have no merit and should be dismissed.

Counsel for the Appellant further submits however, that the trial judge should have left the verdict of man-slaughter to the jury, and should not have ruled it out as he did.

It is the duty of the trial judge to put to the jury every defence raised by a person charged. See Henderson v. The King, supra; Rex v. Hewston and Goddard (1930) 55 C.C.C. 13 (Ont. Sup. Ct. App. D.) per Mullock, C.J.O. at p. 16; Regina v. Nelson, (1968) 2 C.C.C. 179 (B.C.C.A.) per Norris, J.A. for the court at p. 181; Kelsey v. The Queen, supra, per Fauteaux, J. at p. 102.

The trial judge however, is not bound to direct the jury as to every possible defence if that defence has not been raised by the accused. See Rex v. Krawchuk (No. 2), (1941) 3 W.W.R. 563 (B.C.C.A.).

This issue was directly before the court in the Krawchuk case, supra. This was a murder case in which the accused took the stand and gave a version of events that would have been a complete defence if the jury had accepted his evidence, exactly as it would have been in this case.

What the Appellant now seeks is to completely discard the line of defence followed at the trial and argue that the trial judge should have told the jury that they might disbelieve substantially the whole of the evidence tendered by the Crown; that they might also disbelieve Marshall's

story and might at the same time find that Marshall unlawfully stabbed Seale but did so, presumably, in self-defence or as a result of provocation.

It is submitted that a verdict of manslaughter, which the Appellant now contends might have been found if the question had been left open, was excluded by the evidence of the Appellant himself. (See page 193 of the Case - the Appellant denied stabbing Seale or even touching him.)

In the Krawchuk case, supra, MacDonald, J.A. who gave the judgement of the court said at p. 565-66:

> In the present case counsel did not at any stage suggest manslaughter. It is all very well to rely on remarks made by learned judges as to the duty of a trial Judge to put such questions to the jury as arise on the evidence even if counsel has not suggested such questions; but such remarks must be read as generally guiding principles and in regard to the case to which they have relation. They cannot, I think, be taken to mean that a Judge is required to conjure up some fantastic defence inconsistent with substantially the whole of the evidence offered in the case.

See also the comments of Sloane, J.A. at p. 564; and the cases of J.G. Wu (alias Wu Chuck) v. His Majesty the King, (1934) S.C.R. 609 per Lamont, J. at p. 616; Rex v. Flett, (1943)1 W.W.R. 672 (B.C.C.A.) applying Mancini v. The Director of Public Prosecutions, (1942) A.C. 1 (H.L.) at pp. 678, 679; and Regina v. Nelson, supra, at p. 182.

It is submitted that this line of cases is authority for the proposition that the duty of the trial judge to direct the jury on alternative defences is limited to these defences of which the foundation of fact appears in the record.

In the case of Kelsey v. The Queen, supra, Fauteaux, J. put the matter as follows at p. 102:

> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.

It is submitted that the record discloses nothing to convey "a sense of reality" in the argument that manslaughter should have been left to the jury. No jury properly instructed could have found such a verdict on the evidence in the record.

It is finally submitted that the Judge's charge must be regarded as a whole, and not subjected to minute scrutiny by the Appellate Court. See James Ryder (1913), 9 Cr. App. R. 100 (C.C.A.) at p. 104, per Bray, J. The question to be answered is not whether there were errors in the charge, for a charge without error would be rare but rather the effect of any errors in the light of the evidence, and whether or not the jury would be misled by them. See Regina v. Hay, (1959) 125 C.C.C. 137 (Man. C.A.), per Shultz, J.A. at pp. 184,186.

Third Ground of Appeal:
"THAT the learned trial judge misdirected the jury on the meaning of reasonable doubt".

Section 7(3) of the Criminal Code preserves and continues certain rules and principles of the common law that many amount to justification, excuse or defence to a charge. Reasonable doubt is such a principle. In the leading case of Woolmington v. The Director of Public Prosecutions, (1935) A.C. 462 (H.L.), Vicount Sankey, L.C. said at p. 481:

> Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... If, at the end of and on the whole of the case there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Although the principle may be stated in simple form its application to particular cases has often been difficult. Some of the case law relating to the obligation to charge the jury as to the meaning and import of this principle is set out below.

The rule springs from, and has developed collaterally with, the presumption of innocence until guilt be proven. This presumption of innocence is not rebutted until it is proved that the accused committed the crime, that he is "guilty" in the sense that the evidence offered excludes to a moral certainty the defences arising from the evidence, that are inconsistent with guilt.

In the case of Rex v. Sears (1947), 90 C.C.C. (Ont. C.A.), Roach, J.A. said at p. 163-64:

> By reasonable doubt as to a person's guilt is meant that real doubt - real as distinguished from illusory - which an honest juror has after considering all the circumstances of the case and as a result of which he is unable to say: "I am morally certain of his guilt." Moral certainty does not mean absolute certainty. Absolute, that is demonstrable, certainty is generally impossible and juries might well be told that in discharging their serious responsibility their consciences need not be racked and tortured because of the fact that absolute certainty is impossible. They do their full duty when they bring to bear upon all the evidence presented to them all the mental faculties with which Divine Providence has endowed them. No more is expected and if, after applying themselves to the best of their ability, they are, in a criminal trial, morally certain of the guilt of the accused, then it is their duty to return a verdict of guilty. It might even turn out later that they were wrong but they need not be mentally tormented by that possibility provided that they presently use their best judgement and are presently morally certain of the prisoner's guilt.

The necessity is that the jury act in determining guilt on moral certainty, not on probability, and that the jury be so instructed.

Lord Goddard, C.J. in the case of R. v. Kritz, (1949) 2 All E.R. 406 (C.A.A.0 said at p. 410:

> It would be a great misfortune, in criminal cases especially, if the accuracy or not of a summing-up was to depend on whether or not the judge or the chairman had used a particular formula of words.

See also Alfred Summers (1952), 36 Cr. App. Rep. (C.C.A.) at p. 15; and Rex v. Labine, (1937). 69 C.C.C. 151 (Alta. Sup. Ct. App. D.) per per McGillivray, J.A. for the court at p. 153, where it is suggested that the jury must be told in appropriate words that because of the presumption of innocence, the burden is on the prosecution and that the standard for the burden is that of proof beyond a reasonable doubt. See also Boucher v. The Queen (1954), 110 C.C.C. 263 (Sup. Ct. Can.).

The judge in his charge must further direct the jury that there is no onus on the accused in connection with a defence; no onus to satisfy

the jury of his innocence. See Rex v. Hrynyk (1948), 93 C.C.C. 100 (Man C.A.) at pp. 102-03, 104-05, 107-08. The jury must have it brought home to them by the charge that the accused has merely to raise a reasonable doubt in the minds of the jury as to his guilt and that if he does he must be acquited. See Woolmington v. The Director of Public Prosecutions, supra, at p. 481-82; Regina v. Kilian (1952), 102 C.C.C. 241 (Ont. C.A.); Rex v. Arnold (1947), 87 C.C.C. 236 (Ont. C.A.).

It now remains to examine the charge of the trial judge with respect to his directions as to reasonable doubt.

The trial judge commenced his charge on reasonable doubt at page 258 of the case. Commencing at line 19 on page 258 the trial judge stated in clear language

(a) that the accused was to be presumed innocent until proven guilty beyond a reasonable doubt (lines 19-26).

(b) that the burden of proof beyond a reasonable doubt rests on the Crown and never shifts (lines 28-29).

(c) that there was no burden on the accused to prove his innocence (lines 30-33, p. 259, lines 1-5.)

(d) that the jury had a duty to acquit if they had a reasonable doubt as to whether the accused committed the crime (p. 259, lines 9-14).

(e) that "reasonable doubt" meant an "honest doubt" not an imaginary doubt", a doubt which prevented a juror from saying "I am morally certain that the accused committed the offence with which he is charged". (page 259, lines 15-28)

(f) that if they were morally certain that what the Crown contended happened did happen it would be their duty to convict. (p. 260, lines 2-5)

See also p. 268, lines 2-5; and particularly the following passage, which occurs at p. 283, immediately following the trial judge comments on the

evidence of the accused:

> Now if you believe the version of the events that was told by Donald Marshall Jr., then it goes without saying that you must acquit him of this charge. Having gone on the stand he has become another witness in this case. You have the right to determine the credibility of him as a witness as you have the right to determine the credibility of any other witness. But you will bear in mind - that Donald Marshall does not have to convince you of his innocence. He does not have to convince you of his innocence. It is the Crown, as I said over and over again, that must prove his guilt beyond a reasonable doubt. He does not have to convince you of his innocence.

The only issue raised by the Appellant in his defence was the identy of the assailant. The Attorney General repeats the argument made under the 1st, 2nd and 7th grounds of appeal with respect to the treatment of the defence evidence and says that the jury was clearly directed to acquit if his evidence or any of the evidence raised a reasonable doubt in the mind of the jury.

At page 285, the trial judge said

> Why, one would ask in assessing the credibility of the story that he told, keeping in mind at all times that there was no obligation on him to tell anything at any time. There is no obligation on an accused person to say anything, to prove anything. But he has gone on the stand, has given the story and you have the right to judge the credibility of the story and keeping in mind at all times that the burden - the burden - of proving that he was guilty beyond a reasonable doubt must lie upon the prosecution.

The Attorney General says that the charge complies, in its general tenor, and also in its particulars, with the requirements of the authorities on this point.

Counsel for the Appellant relies on the use of the word "satisfaction" which occurs at line 21 of page 258. The Attorney General submits that in view of the comments following, the word refers to the

moral certainty required by the minds of the jury after the evidence rather than to the burden of proof on the Crown. Even if it did not, it is submitted that the use of this word in the context could not have misled the jurors.

Reference is also made to the use of the words "to your satisfaction" at lines 11-12 on page 259. Here, however, the full sentence is

> ...if after considering all the evidence, the addresses of Counsel and my charge to you, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused, Marshall committed the offence of non-capital murder, it is your duty to give the accused the benefit of the doubt and to find him not guilty.

The Attorney General says that this passage is regular and proper on its face and constitutes no misdirection.

The case of Rex v. Megill (1929) 51 C.C.C. 377 (Sask. C.A.) relied upon by Counsel for the Appellant is outside the line of authority which governs this case.

That case involved a murder charge in which the defence of insanity was raised. The defence of insanity is a statutory exception to the rule regarding the question of a reasonable doubt. By section 16(4) of the Criminal Code a rebuttable presumption of sanity is set up, and there is a legal burden on the accused to prove he is insane. The proof required is that of proof on a balance of probabilities. See Cartwright, C.J.C. (as he then was) at p. 270 in the case of Regina v. Borg, (1969) 4 C.C.C. 262 (Sup. Ct. Can.).

The difficulty in Megill, supra, was that the trial judge failed to distinguish clearly enough between the burden on the Crown to prove

guilt beyond a reasonable doubt and the burden on the accused to prove his statutory defence of insanity on a balance of probabilities.

This is not the present situation. At no time was the defence of insanity raised, either by counsel or by the evidence, and it was made abundantly clear by the trial judge at various points in his charge that there was no burden on the accused to prove anything.

Fourth Ground of Appeal:
"THAT the evidence did not establish beyond reasonable doubt the guilt of the accused;"

Eighth Ground of Appeal:
"THAT the conviction is against the evidence, the weight of the evidence and the proper application of the evidence and is perverse;"

These grounds of appeal have the same basis, that is, that evidence offered was not capable of establishing the guilt of the accused beyond a reasonable doubt. They are therefore dealt with together.

It is respectfully submitted that these grounds of appeal are without merit.

The question to be answered by the Court is whether the verdict is in itself unreasonable, and whether a jury properly instructed and acting judicially could find the verdict of guilty that they did find. See MacQuarrie, J. in the case of Taggart v. The Queen, (1956), 114 C.C.C. 274 (N.S. Sup. Ct. in banco) at p. 280, giving the judgement of the court, and again further at p. 280-81.

> In view of the argument addressed to us in the present case, it is well to draw attention to what was said by Harris, C.J. speaking for the Court of Appeal in R. v. M. (1926), 46 Can. C.C. 80 at p. 84, 58 N.S.R. 512: "The tribunal that must be convinced beyond a reasonable doubt is the trial Judge where there is no jury or the jury where there is one." (Cf. Holmes v. The King (1950), 98 Can. C.C. 224). And to Taschereau, J. (Sir Lyman P. Duff C.J.C., Rinfret, crocket, Kerwin and Hudson JJ. concurring) in Cote v. The King, 77 Can. C.C. 75, (1942) 1 D.L.R. 336, where he said:
>
> > "It may be, and such is very often the case, that the facts proven by the Crown, examined separately have not a very strong probative value; but all the facts put in evidence have to be considered each one in relation to the whole, and it is all of them taken together, that may constitute a proper basis for a conviction.

> "When the circumstantial evidence is such that the inference of guilt of the accused might and could legally and properly be drawn, this Court will not intervene. As to whether 'guilt ought to have been inferred in the premises' is a question to be determined by the Jury (Reinblatt v. The King, 61 Can. C.C. 1, (1934); D.L.R. 648, (1933) S.C.R. 694). When it has been found that there is some evidence, from which the jury could properly infer the guilt of the accused, it is not within our jurisdiction to retry the case and alter their findings."

It will be apparent on perusal of the case that the case for the Crown did not depend on circumstantial evidence, but on the direct evidence tendered by two witnesses. It is submitted that there was ample direct evidence upon which the Appellant could be convicted.

See also the case of The King v. M. (1926), 58 N.S.R. 512 (N.S. Sup. Ct. in banco) per Harris, C.J. at p. 518-20 and particularly the excerpt cited therein from the case of Arthur Fred Hancock, 8 Cr. App. Rep. at p. 197, and other cases collected therein.

The evidence of the Crown most closely connected with the stabbing of Seale was that of the witnesses Chant and Pratico.

Pratico was questioned by the Court and satisfied the trial judge that he understood the nature of an oath. He was then sworn with no objection from defence counsel. (See p. 118). It is submitted that this is a question of fact for the trial judge and that counsel for the Appellant has provided no reason why the decision of the Appeal Division should be substituted for the decision of the trial judge.

Pratico placed Seale and Marshall at the scene of the crime and gave direct evidence of having seen Marshall stab Seale. He was acquainted with both Seale and the Appellant and made a positive identification of both. (See p. 121,122,146). He was cross-examined most carefully and fully by defence counsel. The fact that he had been

drinking a substantial amount the night of the stabbing was the subject of detailed cross-examination, and the trial judge (at pp. 278-79) commented on this in clear language, relating his drinking to his credibility and leaving the matter for the jury to decide.

With respect to his statements before and during the trial to the effect that Marshall did not stab Seale, it is submitted that good and sufficient reason was shown for this inconsistency at p. 173, 174 of the transcript - the witness was in fear of his life being taken if he testified that Marshall had stabbed Seale.

These issues were placed fully before the jury by the trial judge (see p. 278) and the determination of credibility in the light of this evidence was expressly left to the jury (see p. 279).

The witness Chant was another observer of the incident. His evidence corroborates in every material particular that of the witness Pratico. His testimony also places a person crouched in the bushes from where Pratico said he had witnessed the scene (p. 95). Chant declined under oath to swear that the man who did the stabbing was Marshall (see p. 100, 108, 109), but this was inconsistent with a previous statement made under oath at the preliminary hearing. (See p. 100 and pages 103-105). His testimony, taken with that of Pratico, provides a complete picture of what the Crown says occurred.

Counsel for the Appellant objects that there was no inquiry as to whether or not he understood the nature of an oath. With respect, the case at p. 86 indicates that such an enquiry was made and that the

court was satisfied that the witness did understand the nature of an oath. The Attorney General repeats the arguments made on this point with respect to the witness Pratico.

The witness admitted under cross-examination that he had told the police an untrue story, as indicated by Counsel for the Appellant. However, an explanation was given (at p. 116) on re-direct examination. The point was commented on at length by the trial judge in his charge, (see p. 272-273) and after appropriate instruction the issue was left to the jury to consider.

Chant gave no explanation for his fear, possibly because the Crown considered that in the light of the objection which followed immediately from defence counsel, such questioning would not be permitted. The case (p. 116,117) provides some basis for this.

With respect to Pratico, it is submitted that there was ample evidence tendered to substantiate Pratico's fears. The difficulty is that it involved conversations addressed to the witness by third parties not before the court. The trial judge refused to permit these questions. The Appeal Division has the entire record before it and can come to its conclusions on the whole of the record. Reference should be made to pages 163-165 of the case.

ARGUMENT ON THE 5TH, 6TH, 9TH, AND 10TH GROUNDS OF APPEAL

The Attorney General says that these grounds of Appeal are without merit and should be dismissed. Such argument as may be required by the court on any or all of these points will be made orally at the hearing of the appeal.

Eleventh Ground of Appeal:
"THAT the Learned Trial Judge improperly permitted the Prosecuting Officer to cross-examine the witness, Maynard Chant, before ruling that such witness was adverse".

The argument presented in the factum of Counsel for the Appellant under this ground of appeal does not appear to arise from the language of this ground of appeal, which relates to cross-examination of Chant prior to a finding of adversity. The argument in the factum relates to the reading of evidence by the prosecutor (in the absence of the jury) which had been given by Chant at the preliminary hearing.

The attention of the court is drawn to this apparent inconsistency only for the purpose of distinguishing the arguments to be made on one point from those on the other.

As regards the cross-examination of the witness Chant which the Appellant alleges took place prior to a finding by the trial judge that he was adverse. The Attorney General says that there was no such cross-examination.

The direct examination of Chant commenced at p. 87 of the case. This examination proceeded in proper fashion and without any objection from defence Counsel which related to alleged cross-examination. Defence Counsel interrupted the direct examination at three points, (pp. 89,92,95) but these would appear to relate to other matters.

The court recessed (see p. 95) and upon reconvening, the direct examination continued. At pp. 95-96 Crown Counsel repeated several questions to which he had already received answers in earlier portions of the direct examination (see pp. 89-90). Counsel for the defence quite properly objected

to this line of questioning and the prosecuting attorney indicated that he was preparing the way for an application under section 9 of the Canada Evidence Act. At this point, the jury withdrew, and the court heard evidence and argument which resulted in the court granting permission to the Crown to cross-examine Chant on his previous inconsistent statement.

The questions objected to by Defence Counsel were repetitive and in other circumstances might have been improper since they covered ground already covered earlier in the direct examination. However, they elicited no new information, were not leading or suggestive, and, it is submitted, do not constitute cross-examination.

From the words of section 9 of the Canada Evidence Act and from the cases of Regina v. Milgaard, (1971), 2 C.C.C. 206 (Sask. C.A.); Her Majesty the Queen v. Calvin Douglas Polley, S.C. No. 16182 (N.S. Sup. Ct. App. D., as yet unreported) and Regina v. Cooper, (1970) 3 C.C.C. 136 (Ont. C.A.) the law appears to contemplate two kinds of cross-examination where a previous inconsistent statement is concerned.

The right to cross-examination under section 9(1) appears from the cases to be much broader than that under section 9(2), and requires a finding of adversity by the court before it can commence. The permission given under section 9(2) is much narrower and appears to require that the examination be restricted to the statement. It requires no finding on the part of the court that the witness is adverse.

In the result, permission was given for the Crown to examine the witness on his previous statement. It is not clear whether or not this involved a finding by the court that the witness was adverse. The last statement by the court at page 102 would indicate otherwise, but the remarks

by the court at p. 106 might be taken to mean that the trial judge had either found the witness to be adverse at the close of the voir dire (p. 102) or that he had so found after hearing him cross-examined on his previous statement.

It is submitted that whether the finding of the court amounted to a finding of adversity or merely to permission to cross-examine on the previous statement Crown Counsel stuck strictly within the limits of the lesser right to cross-examine under section 9(2) (see pp. 103-105). It would seem to follow in the result, therefore, that there has been no substantial wrong or miscarriage of justice.

In the result, therefore, it is submitted:

(a) that no cross-examination occurred before the witness was declared adverse, if he was declared adverse.

(b) that it was not necessary in any event that he be declared adverse in order to permit the type of cross-examination that did in fact occur.

(c) that in any event, there was no substantial wrong or miscarriage of justice.

The Appellant's Counsel submits in his brief of argument that the reading of Chant's evidence by the prosecuting officer had the effect of conditioning Chant, who remained on the witness stand, for the evidence he would give on the return of the jury.

It is submitted that the most important consideration in the exercise was to determine whether or not the testimony given by Chant at the preliminary hearing was inconsistent with the testimony at trial.

This being the case, it was necessary for a certain amount of discussion to take place. The evidence had all been transcribed, and

the question of voluntariness was not at stake in this voir dire. The only issue was of inconsistency with present testimony. Defence Counsel could therefore have interrupted at any time to request either that Chant be removed or that the trial judge read from the preliminary transcript in silence until he had determined the issue. Since he chose not to do either of these things, it does not lie with him now to question the proceedings.

In any event, it is submitted that there has been no substantial wrong or miscarriage of justice in this instance. The substance of Chant's testimony was that he did not recognize Marshall at the time he was alleged to have stabbed Seale. This came out both in direct (p. 90,95) and cross-examination (p. 108, 109) and it is further submitted that if Chant's testimony at the preliminary in this respect is examined carefully the same conclusion is obtained.

PART IV

CONCLUSION

In view of the foregoing, it is respectfully submitted that the charge to the Jury when read as a whole is a fair and proper one; that the Jury's verdict is supported by the evidence and is a proper one and that the appeal should be dismissed.

All of which is respectfully submitted.

Milton J. Veniot
Solicitor for the Respondent
Attorney General

Halifax, Nova Scotia
January 24, 1972

DUBINSKY, J.:

Mr. Foreman, and gentlemen of the Jury:

I am sure that we are all pleased that we have come near the end of this case. I should like to join with Messrs. Rosenblum and MacNeil in thanking you for the very keen way in which you have followed the proceedings of this case from the very beginning.

It seems to me, Mr. Foreman and gentlemen of the Jury, that as long as jurors will give that sort of attention which you twelve men have given to the matters that came before you these past couple of days, so long will the jury system retain the confidence and the respect of our fellow citizens and so long will they the more easily resist any attempts that are made to alter or do away with this great institution. If we are to resist those who criticize and question the value of the jury system, let me say to you, Mr. Foreman, that the answer lies in the fact that men and women when called come and do their duty, not for the little emolument that is involved here, but because jurors are connected with a heritage of justice and freedom. So long as jurymen and jurywomen approach their task without weakness, without misplaced sympathy, so long as they comply with the oath that they have taken before God, so long will this jury system endure.

Now in this case as in many others, things have been said about it in the news media. On my instructions, you have separated during overnight adjournments and you have separated during luncheon hours. If you have read or heard anything about this case outside this courtroom, it is your duty to banish it from your minds. You must decide whether the accused is guilty or not guilty solely upon the evidence which you have heard in this court room during the trial of this case. In that way, Mr. Foreman, and in that way alone, can you discharge your very heavy responsibility. In this way and in this way alone, can you discharge your duty, a duty which you owe equally to your country, as well as to the accused man, Donald Marshall Jr.

Now the very first thing that I want to say to you, and it has been very well said by Mr. Rosenblum, is that the fact that a man is charged and brought into this court does not mean that he is guilty. The Crown must prove to you by legal and competent evidence that convinces you beyond a reasonable doubt that the accused is guilty. As he said, a man accused of a crime is presumed to be innocent until he is proven guilty, and as both counsel, both Mr. Rosenblum and Mr. MacNeil fairly said to you, the burden of proof rests upon the Crown and it rests upon the Crown from the very beginning of the trial until the end. Now I shall make reference to this later as I go along.

Counsel for the Crown have called a number of witnesses whose evidence, Mr. MacNeil submitted to you yesterday afternoon, went to prove that the accused, Marshall, was guilty of the crime of non-capital murder. On the other hand, counsel representing the accused, by the cross-examination of the Crown's witnesses and by calling the accused himself, endeavoured to establish - to point out to you, according to Mr. Rosenblum, that the evidence for the Crown does not have the weight - that weight and that sufficiency necessary to discharge the onus upon the Crown. You heard Mr. Rosenblum and Mr. MacNeil summarizing the evidence and submitting their views to you. I would like to say in passing, Mr. Foreman, that we should, all of us, you and I, be very indebted to these four members of the Bar of Nova Scotia, who appeared before us during this trial and who represented the very highest ethical standard of the legal profession in this province. Mr. Rosenblum, in his submission to you, made a very forceful plea on behalf of the accused. His plea marks Mr. Rosenblum, in my humble opinion, I may say in passing, as a leading member of the Bar of Nova Scotia. Mr. MacNeil in his submission to you showed you that he is a highly regarded prosecutor in this province of Nova Scotia and he has also made a forceful submission on behalf of the Crown. But these two men, Mr. Foreman, would be the first to say to you that this is not a contest between them - between two lawyers. You who are the jury and I the judge must remember that our duty is to look at the evidence and from that source

alone to arrive at the conclusions which are required by justice and by law, not being entirely unmindful, of course, of what I said were the very good arguments, presented to you yesterday afternoon by these two men.

Now it is my duty, Mr. Foreman, to make clear the law that is applicable in this case. I will try as best as I can to do that and as simply as I can to enumerate the legal principles that are involved in this very serious case. A judge speaking to a group of lay people, such as you are, must keep in mind that it is not always easy for them to comprehend and to follow the principles of law that are involved in cases. It is up to the judge to try to make those principles understandable to the jury so that they will be the better able to apply the law as given to them by the judge to the facts of the case.

Now I intend, of course, to deal with matters of law. That has been pointed out by both counsel, but I am also going to deal, to some extent, with the facts in this very important case. In a very well known murder trial some nineteen years ago, Azoulay v. The Queen, (1952) 2 S.C.R. 495, Mr. Justice Taschereau, who later became the Chief Justice of Canada, pointed out that in a jury trial the presiding judge must - note he said "must" - except in very rare cases where it would be needless to do so, review the substantial parts of the evidence. He must present to the jury the case for the prosecution and the theory of the defence so that they, the jury, may appreciate the more the value and the effect of the evidence and the law that is to be applied to the facts as they, the jury, find them. It is not sufficient for the whole evidence to be left simply to the jury by the judge and say, "There, you have heard the facts; go ahead and decide upon them and render your verdict." The Azoulay case has been followed by many other cases in the past nineteen years in Canada. What I am getting at, Mr. Foreman, is that the pivotal points on which the prosecution bases its case and the pivotal points on which the defence stands must be clearly presented to the jury's mind by the judge. Now it is understandable that I don't have to,

and certainly I could not, review all the facts. I don't intend to do it. Indeed the facts have been very carefully looked into and developed by the two counsel who spoke to you yesterday and they have lessened a great deal of my work and duty for me.

But there is a very important distinction which you will remember and which was also referred to yesterday. When I speak to you on matters of law, it is your duty, Mr. Foreman and gentlemen, as counsel said, to act on my instruction as being absolutely correct in every respect. When you are inside in your room deliberating, any question of the law that may have come up, you will take as having been correctly stated by the judge in the way that I have done it. The rule then, in short, is that the law is for the judge. If I make a mistake in the interpretation of the law or in anything touching upon the law - by the way, you understand, you know that whatever I am saying here this morning is being reported by our court reporter and will, if necessa be scrutinized later. If I make a mistake - where is the human being who has not made a mistake or who does not make a mistake, but if I do so here today, there is a remedy open to the party that is aggrieved by my mistake. As far as you gentlemen are concerned today, you will follow the law implicitly as I give it to you.

But when I speak about the facts, I am in my own way endeavouring to assist you in coming to a conclusion. As I mentioned, The Supreme Court of Canada has laid down that it is the duty of the judge to deal with the facts. But I stress, Mr. Foreman, I am saying it now and I will repeat it as I go along perhaps a number of times, you do not have to agree with me on the facts - you do not have to agree with me on the facts. It is your duty to decide what the facts are in this case from the evidence which you have heard. During my remarks, consciously or otherwise, I may express an opinion with regard to the evidence which has been given by one or more witnesses. And if I do that, I want to merely say that you - to emphasize that you are not in any way bound by my opinions as to the facts concerned. Evidence upon which I may comment may have left on your mind a very different

impression from the impression it has left on my mind. It is your duty to place your own interpretation upon the evidence. It is your duty to weigh the evidence and to come to your conclusion as to what you believe and what you do not believe. If there should be evidence which I don't mention, yet which you recall, that doesn't mean for one moment that the evidence which I omit or failed to discuss is unimportant. No, Mr. Foreman and members of the jury, all the facts are before you, whether I mention them or not. And when I speak of the facts, you will have noticed that I have been jotting down, through the trial hurriedly, the evidence and making my own notes. However, I did ask our capable court reporter to transcribe a couple of parts of the evidence for me which I intend to read to you later. But when I quote from my own notes - from my own notes - if you are in any doubt as to the accuracy of my notes, you will take your recollection rather than what I have given to you. Of course, it is understandable that if I make a mistake on the evidence, it will not have been done intentionally.

Now if at any time during your deliberations you require something to be read back to you, if you are not clear on some piece of evidence, you come back here and we will have it read back by the reporter or played back in the machine. You will listen to that portion which you wished to have read over again. That will be your privilege to make known to me that you wish to have certain portions of the evidence heard again.

As the facts are for you, so are the inferences from the facts. You can draw inferences from the facts and I'll come back to that later. You can draw inferences from the facts provided that the inferences are founded upon evidence that has been properly established and which are the logical results of the evidence - the logical consequence. The inference flows logically from the evidence that has been presented to you and which you accept. Don't make any inference, Mr. Foreman, gentlemen, against the accused, Marshall, unless in your good judgment it is the only reasonable and rational inference open on the facts.

Now in considering the facts, naturally you have to decide what witnesses that you heard here the past few days - what witnesses you are going to believe; how much of their evidence you are going to believe; what part you will have listened to more carefully than some other part. You will have to sift through the evidence in this case. That's your responsibility! You are twelve man with common sense, with normal ability and normal intelligence. You have seen all the witnesses come before you. You have heard their evidence. You have seen their demeanour on the stand. It is up to you to assess the credibility of what they said, the degree or the extent to which you believe they have been telling the truth. People speaking of the events of some months past may have forgotten some details, may be uncertain as to the exact time or the exact spot or place, as to where and when something happened and it may be that they are perfectly honest when they tell you of their recollections as they remember them at that time. Now then, you may believe all the evidence given by a witness, a part of the evidence given by a witness or, indeed, none of the evidence given by a witness. When deciding upon the credibility of a witness, of the weight you are going to give to the evidence of a witness, you should consider what chance the witness had to observe the facts to which he or she testified and how capable the witness is of giving an accurate account of what he or she saw or heard. You must also decide, Mr. Foreman, whether the witness is biased or prejudiced, whether the witness has any interest in the case. These are some of the factors which must be considered when deciding upon the credibility or the truthfulness of a witness or the weight that is going to be attached by you to the evidence of a witness. There is always the possibility that a witness may be prejudiced or biased and in such circumstances may be giving a colcured account of what he saw or heard. Also, there is the possibility that a witness may have been discussing the case with others and has gradually built up an account of what took place which the witness may believe to be true, but which is more the result

of rationalizing as to what took place rather than that the witness actually heard or saw with his or her own eyes. If you have any reasonable doubt as to the accuracy of the evidence given by any witness or the weight that you should give to such evidence, I charge you to give the benefit of the doubt to the accused and not to the Crown. If you have any doubt as to the accuracy of any witness, I charge you to give the benefit of that doubt to the accused.

In approaching this case, you must be entirely impartial. You must banish from your mind all prejudices and preconceived notions. Indeed, I am not suggesting that you have any, but it is my duty to tell this jury and any other jury that such has to be done. You must decide, and I know you will decide, the guilt or innocence of the accused man, Donald Marshall Jr., without fear, without favour, without prejudice of any kind, but in accordance with the oath that you have taken before God.

I will now deal with what is known as the presumption of innocence. This presumption is woven into the fabric of our law in Canada, in England and in all freedom loving countries. It means that an accused person is presumed to be innocent until the Crown has satisfied you beyond a reasonable doubt of his guilt. It is a presumption which remains from the beginning of the case until the end and the presumption only ceases to apply if, as was said by defence counsel yesterday - it only ceases to apply if, having considered all of the evidence, you are satisfied that the accused is guilty beyond a reasonable doubt.

I said before that I would deal with the question of onus or burden of proof. The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden on an accused person to prove his innocence. I repeat, there is no burden on an accused person to prove his innocence. Let me make that abundantly clear. If during the course of this trial, from beginning to end, during anything that may have been said by

counsel during their speeches, that might in the slightest way be considered as suggestive of any burden on the accused to prove anything, let me tell you that there is no burden on the accused. The Crown must prove beyond a reasonable doubt that an accused is guilty of offence with which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused committed the offence of non-capital murder, the offence with which he is charged, then it is your duty to give the accused the benefit of that doubt and to find him not guilty. In other words, if after considering all the evidence, the addresses of counsel and my charge to you, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused, Marshall, committed the offence of non-capital murder, it is your duty to give this accused the benefit of the doubt and to find him not guilty. The words "reasonable doubt" are difficult to define. Perhaps it is because there are certain expressions which defy definition, But yet, Mr. Foreman, the moment you hear these words, "reasonable doubt", you understand what they mean. I would say that the words, "reasonable doubt" mean an honest doubt, not an imaginary doubt conjured up by a juror to escape perhaps the responsibility of his conscience. It must be a doubt which prevents a juror from saying, "I am morally certain that the accused committed the offence with which he is charged." In other words, that is the sort of doubt which would prevent you from saying, "I am morally certain that the accused committed the offence with which he is charged." In other words, that is the sort of doubt which would prevent you from saying, "I am morally certain that he committed the offence." I am repeating myself, of course, because I consider it to be so very important. If after hearing all the evidence, the addresses of counsel, my charge, you will say to yourselves, or/any of you, "I am not morally certain that he committed the offence", then that would indicate to you - that would indicate there is a doubt in your mind and it would be a reasonable doubt which prevents you from arriving at the state of

mind which would require you to find a verdict of guilty against this man. If, however, you can say! "I am morally certain that what the Crown contends is what happened here in this case", then you have no reasonable doubt and your duty, your responsibility, is to find him guilty of the offence of non-capital murder.

The matter of motive requires a word or two from me, Mr. Foreman. You may ask yourselves, has there been any proof of motive in this case? Proof of a motive for an alleged crime is permissible and often valuable but I direct you that it is not essential. Evidence of motive may be of assistance in removing doubt and completing proof -you follow me - evidence of motive may be of assistance in removing doubt and completing proof. Motive is a circumstance but nothing more than a circumstance to be considered by you. The absence of a motive is a circumstance which must be equally considered by you on the side of innocence tending to substantiate or to support the presumption of innocence and to be given such weight as you deem proper. But if after consideration of all the evidence you believe it has been proven beyond a reasonable doubt that the accused committed the crime with which he is charged, the presence or absence of motive becomes unimportant.

Now intent - intent! In the crime that is charged here, it is necessary that in addition to the act which characterizes the offence, the act must be accompanied by a specific intent and must in this case, in the crime of murder, be a necessary element in the mind of the perpetrator of a specific intent to kill, or as I will explain in detail later, to do other things. And unless such intent so exists, the crime is not committed. The intent with which an act is done is manifested by the circumstances attending the act - the circumstances how the act is done, the manner in which it is done, and the state of mind of the person committing the act. While you may proceed, Mr. Foreman and gentlemen, on the common sense proposition that most people usually intend the natural consequences of their act - most people usually intend the natural consequences of their act - nevertheless, you

must consider the state of mind of the accused at the material time and decide whether he intended the natural consequences of his act. I will say that what a man does, surely is one of the guides as to what he intends and sometimes it is the only trustworthy guide.

Now you have also heard in this case the evidence given by experts - expert witnesses. I will merely say that they are duly qualified experts who gave opinion evidence on questions in issue in this trial. You will consider the opinions they expressed in the evidence they gave. You are not bound to accept the opinion of an expert as conclusive but you should give to the evidence of these experts the weight that their testimony deserves. You remember Miss Mrazek and Mr. Evers of the R.C.M.P. They are experts. They have been accepted as experts. Miss Mrazek, the serologist - the lady who talked about blood. Mr. Evers, the hair and fiber expert; Dr. Naqvi; Dr. Virick; Dr. Gaum - they were all experts. Miss Meryl Faye Davis, the nurse - an expert. Give to the expert testimony the weight that you feel it deserves. These people have been called here to give evidence because they are skilled in particular fields and we take advantage of their skills to tell us something about what they did, their opinions. But you, Mr. Foreman and gentlemen, are the ones who must decide even on the testimony of experts.

Now just a brief word about your duties in the jury room. It is your duty to consult with one another in there, to deliberate with a view to reaching a just verdict according to law. Each of you must make your own decision whether the accused is or is not guilty. You should do so only after consideration of all the evidence with your fellow jurors and you should not hesitate to change your mind if you are convinced that you were wrong - in your first impression. After discussion and going over the matter, your original view you may find perhaps was wrong and you should not hesitate to change your view if the facts warrant same.

Since this is a criminal trial it is necessary that you should all be unanimous in your verdict. In other words, it is necessary that each and all of you should agree on whatever verdict you may see fit to return. Unless you are unanimous in finding the accused not guilty, you cannot acquit him. Nor can you find a verdict of guilty, unless you are unanimously agreed that he is guilty. If after some considerable careful consideration you are unable to agree, then of course you will report to me. I urge you, however, to try to reach a conclusion one way or another.

Now in this case, Mr. Foreman, the indictment reads that,

> "The Jurors for Her Majesty the Queen present that Donald Marshall Jr. at Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May, 1971, did murder Sanford William (Sandy) Seale, contrary to s.206(2) of the Criminal Code of Canada."

I intend to read to you certain portions of the Criminal Code. The Criminal Code is the statute of this country which governs all criminal matters coming within the jurisdiction of Canada. As I proceed with my charge, it will become necessary to refer to other sections. But now let us turn to s.206(2) and to that much of it as concerns you:

> "Every one who commits non-capital murder is guilty of an indictable offence ..."

Every one who commits non-capital murder is guilty of an indictable offence! Now we turn to s.194 and we find this:

> "(1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide."

I will come back to this section later but at this moment let us turn to one more for a moment, 202A:

"(1) Murder is capital murder or non-capital murder." Now let me close out any thoughts about capital murder because by a very unintentional slip yesterday, Mr. Rosenblum said something which compells me to make very clear - I know it was unintentional - this case is not a case of capital murder for which the penalty is death. This case is not the case of capital murder for which the penalty is death. So capital murder does not concern you. I may tell you that a capital murder case exists where a person kills one of a certain class, a class of which Sanford William (Sandy) Seale was not one. This class will refer to police officers, police constables, members of any police force, someone in charge of a jail, warden or such type of a person. Causing the death of one of this type, a person may be guilty of capital murder. There is not the slightest evidence in this case that the late Sanford William (Sandy) Seale was a policeman or any one of that class. If there is murder in this case at all, then it is what we call non-capital murder. That's the charge that has been laid and I repeat again, the charge we are dealing with is non-capital murder.

Now as I said before, culpable homicide is murder - in our case, non-capital murder; or it is manslaughter or it is infanticide. Let me finish off with the last part, infanticide, so we won't have to worry about that. Under s.204, Mr. Foreman and gentlemen, you will find the law regarding infanticide and as you all may probably know it deals with the case of a female person who causes the death of her newly-born child. So we have nothing to do with that in this case.

We come back to the simple statutory provision, culpable homicide is murder or manslaughter. Now the next question you have a right to ask me is, what is the meaning of culpable homicide, what is culpable homicide, what does it mean. Well, once again, last evening I looked up the word in the dictionary here, and while you may have your own definition or explanation, let me say to you that the word "culpable" - C-U-L-P-A-B-L-E - culpable, suggests or infers the meaning of blameworthiness, deserving of punishment.

Anything that is culpable is deserving of punishment. So homicide, the killing of a human being, is deserving of punishment, is blameworthy or it isn't blameworthy. Homicide is culpable or is not culpable. The killing of a human being may be blameworthy or it may not be blameworthy. You know, Mr. Foreman and gentlemen, I don't have to tell you, I'm sure that some of you have served in the Armed Forces. There were two world wars; there was the Korean Conflict and the wars that are taking place in the world even at this moment and we may bemoan the futility of war but that does happen in man's history from time to time. But in wartime while people kill, soldiers kill, they are not committing murder unless perchance, they go to all sorts of atrocities. But as a rule, the average soldier in battle though he kills, is not committing murder. Let us take another illustration more at home, closer to home. You are driving down George Street; there is a school at the corner of George and Dorchester. You are driving past that school, Mr. Foreman, and suddenly a little child will run out from the school grounds into the path of your car and is struck by the car and is killed. That's homicide! That's homicide, a child has been killed; a person has been killed; a human being has been killed. But certainly not by any stretch of the imagination or by law can it be said that in those circumstances you or I or anyone to whom that unfortunate event would have happened would be guilty, would be deserving of punishment criminally. Indeed, indeed, whoever to whom it happened would not be deserving of having to pay any civil damages. It would undoubtedly be an unfortunate accident in every sense of the word. There would be nothing blameworthy about the killing of this child. Culpable homicide is homicide that is deserving of punishment!

Now when we come to what is murder we turn to s.201 and we find,

> "Culpable homicide is murder
>
> (a) where the person who causes the death of a human being
> (i) means to cause his death, or
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;"

That's murder! That's culpable homicide, Mr. Foreman, where the person who causes the death of a human being, one, means to cause his death or two, means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not. That's murder! That's murder! I think that's pretty clear, Mr. Foreman. I don't think I have to enlarge upon that.

Now let's go for a moment to s.205 of the Code, just briefly and we find here, 205, the following:

> "Culpable homicide that is not murder or infanticide is manslaughter."

Well I've said that in another way before. Culpable homicide that is not murder or infanticide is manslaughter. I've dealt with what is murder. I've explained to you what is infanticide and now I have read to you s.205.

Now Mr. Foreman, in a few moments I will instruct you why as a matter of law, my instructions to you, is that in this case you do not have to consider the question of manslaughter but in order that you will have the completed picture before you, let me give you an example of the difference between non-capital murder and the crime of manslaughter. Suppose that two farmers are neighbours and they quarrel over the location of the boundary between their two farms - not a very common event but yet not entirely uncommon as I'm sure most of you probably have heard - the bitter argument that may occur over the boundary between the two farms. Now one day Farmer A sees Farmer B moving the survey posts that he had put down and in anger, he takes his gun, his rifle, and he shoots B and kills him. In such a case, Farmer A committed culpable homicide when he caused the death of Farmer B by an unlawful act, that is by shooting Farmer B and since he meant to cause the death of Farmer B, he meant to shoot him, he meant to kill him, or he meant to cause him bodily harm which could have caused death and he was reckless as to whether death ensued or not, he committed non-capital murder. On the other hand, suppose that on this occasion when Farmer A saw Farmer B removing the survey posts, Farmer A lifted his gun, intending to shoot over the head of Farmer B, not to strike him, not to kill him, but to frighten him

and as he lifted the gun he stumbled and the direction of the gun went from pointing upwards to straight ahead and the bullet struck and killed Farmer B. In such a case Farmer A commits culpable homicide. He committed culpable homicide when he caused the death of Farmer B but because Farmer A did not mean to cause the death of Farmer B, he didn't mean to cause him bodily harm which might have resulted in death and he was not reckless as to whether death ensued or not, Farmer A committed manslaughter. In short, even though the killing in that case was culpable homicide, it was not murder but manslaughter, since the all important intent, the all important element of intent, do you follow me - the all important element of intent, was absent.

Now, let me turn for a moment to the evidence of the two doctors, Dr. Naqvi and Dr. Gaum. I have taken this from the official record, excerpts, not the full report. I'm not giving you the full report of their testimony but what I am reading to you is from the official record which I have taken with the assistance of the court reporter. Dr. Naqvi said that "the victim was a coloured teenage boy who has had his bowel outside his abdomen and an opening into the abdomen approximately three inches to four inches wide and his clothes were filled with blood. He himself was in a state of shock; very critical, no pulse; no blood pressure and he was on the verge of death. His bowels were torn; his vessels were torn and he had massive bleeding inside and his major vessel was cut. Sharp pointed object that has penetrated through the abdomen and all the way down to the back. Kidneys were shut down; his respiration was shut down. Cause of death, injuries to his bowel, his vessels." Dr. Gaum, came in later and was speaking about the second operation and he said that, "after exploration the wound to the aorta was found. The aorta runs from up around this region of the chest and curves right down. It's the major blood vessel that originates from the heart to supply the rest of the body. It was punctured as I recall it about one-half inch or so. Condition continued to deteriorate. Was brought back to the OR again to deal with his continued hemorrhage and after re-exploration, the wound in the aorta was found. He did have other

"injuries to the vascular supply of his bowel which had been dealt with at the previous operation and he continued to have quite a bit of hemorrhage from the mesentery of the bowel, the tissue which carries the blood vessels to supply the bowel and he did have a lot of bowel which was deprived of its blood supply and it was becoming gangrenous." That is the description of the injuries which William Sanford (Sandy) Seale received.

You will remember that Leo Curry, the ambulance operator, took the injured man to the hospital - the injured man there on the road, he took him to the hospital. And he was with him until Dr. Naqvi arrived. Dr. Gaum assisted Dr. Naqvi and Dr. Gaum identified the injured man, the man who died, as being William Sanford (Sandy) Seale. There is therefore no doubt in the world that the person who sustained the wounds described by the doctors was William Sanford (Sandy) Seale. There is no doubt that it was he who received the wounds. There is no doubt in the world, Mr. Foreman, that Mr. Seale died as a result of these wounds. In my opinion, and please remember, as I told you before and I will tell you again and again, that you do not have to accept my opinion - in my opinion, you will decide yourselves - my opinion, the nature and the extent of the wounds inflicted on the late Mr. Seale are such that whoever caused these wounds intended to kill him, or intended to do him bodily harm that he, the person who did it, knew was likely to cause his death, Seale's death, and he, the person who did it, was reckless whether death ensued or not. In short, whoever committed these wounds on William Sanford (Sandy) Seale, committed non-capital murder. That's my opinion! You do not have to accept my opinion! You are the sole judges of the facts. You will decide yourselves. You do not have to accept my opinion. My opinion is that whoever caused these wounds committed non-capital murder. The facts in this case, in my opinion, do not give rise - the facts in this case as they came before you, gentlemen of the jury, from beginning of the case to the end, do not give rise to your having to consider the crime of manslaughter and therefore, I charge you that

your verdict in this case is to be either guilty or not guilty of murder - guilty or not guilty of murder. The important question therefore for you is whether or not the Crown has established beyond a reasonable doubt that it was Donald Marshall Jr. who committed the murder of William Alexander (Sandy) Seale.

Now I have spoken for some considerable time and I'm going to pause to give you a chance to go in your room. But inasmuch as I am continuing with the charge, you will please, gentlemen, remain in your room. Do not go out in the corridor under any circumstances. Remain there! I will stay in my room alone. In about ten minutes time, I will come back and I will continue with my charge after all of us have had a chance to refresh ourselves.

(11:10 A.M. COURT RECESSED TO 11:30 A.M.

11:30 A.M. JURY POLLED, ALL PRESENT)

Now Mr. Foreman, gentlemen of the jury, I told you that I would deal with the facts to a certain extent. I think it is clear that the Crown's case is based principally upon the evidence of two witnesses, Maynard Chant and John Pratico. There are of course a uple of other witnesses too to whose evidence I will refer. But the case for the Crown, in my opinion, rests principally upon these two witnesses. So I have had the court reporter transcribe for me from the evidence of these witnesses. For the time being I am going to talk about the case for the Crown and I will turn. of course, to the case for the Defence. I may not have all that he said. I may not read you back all that he said but what I am reading is from the official record.

Maynard Chant - this is in direct examination - that is examination by the Crown -

"Q. Did you notice anything as you walked along the railway tracks?
A. I noticed a fellow hunched over into the bush.
Q. Good and loud now.
A. I noticed a fellow hunched over into a bush.
Q. Where would that be on this plan?
A. Right there.

"Q. You're pointing to a bush that is opposite -
(Court directs to mark plan)
A. Witness marks plan.
Q. The bush that you have marked with the letter X is the tenth bush from Bentinck Street when counting in an easterly direction along the railway tracks: that is the bush in front - between the houses marked MacDonald and M. A. McQuinn, is that correct, the tenth bush?
...
Q. When you observed this man, did you recognize him?
A. No sir.
Q. Beg your pardon?
A. No sir.
Q. What did you do?
A. Oh, I kept on walking down a little farther. I walked down a little farther and looked back to see what he was looking at. He was looking over towards the street. So I looked over and saw two people over there."

I pause now to repeat, he said he saw two people over there.

"Q. Did you recognize either of these people?
A. No. And I guess they were having a bit of an argument.
Q. Why do you say that?
A. I don't have no reason why.
Q. Could you hear what they were saying?
A. No.
Q. What took place?
A. Well one fellow, I don't know, hauled something out of his pocket anyway - maybe - I don't know what it was. He drove it towards the left side of the other fellow's stomach.
Q. What took place, what then?
A. Fellow keeled over and I ran.
Q. You ran from the scene?
A. Yes.
Q. Can you describe these two men, what they were wearing?
A. The fellow that had keeled over, he had a dark jacket and pants and that on. The other fellow had, I thought it was a yellow shirt at first but after a while he caught up to me and it was a yellow jacket.
Q. Tell me, sir, before you ran from the scene did you recognize either of these two gentlemen?
A. No sir.
Q. Then what did you do?
A. I ran down the tracks and cut across the path right onto - I don't know the name of the street ... towards bus terminal and I saw a fellow running towards me. I turned around and started to walk up the other way. He caught up to me and by

" that time I recognized him and it was Marshall - Marshall fellow.
Q. Donald Marshall?
A. Donald Marshall.
Q. That's the accused in this case here. Do you see him in court here today?
A. Yes.
Q. Would you point him out ...(Then the question -)
Q. Whereabouts did he catch up to you?
A. I guess it was about two houses down, maybe three.
Q. Can you point out on exhibit 5 where he met you on Byng Avenue?
A. Right there.
Q. Around the area in which is noted what?
A. Red house, Mattson?
Q. The area of the house shown as Mr. Mattson's on Exhibit 5, now what took place there, sir?
A. He caught up to me and I stopped and waited. He said, 'Look what they did to me.' He showed me his arm. Had a cut on his arm and I said, 'Who' and he told me there was two fellows over the park. By that time another couple, like two girls and two boys came along and he stopped them and asked them for their help, you know. They said, 'What could we do to help?' and the girl gave him a handkerchief to put over his arm. He showed his arm and it was bleeding. So they kept on going. A car come along and he flagged that down-
Q. Who flagged it down?
A. Marshall. And we got in the car and drove over to where the fellow was at.
Q. Where what fellow was at?
A. Over - the body on Crescent Street, I guess, and the fellow was at Crescent Street.
Q. Was this where you had seen the action you had described earlier in your evidence?
A. Yes sir.
Q. About the two men that were there and then one man keeling over and so on, this area in which this took place?
A. Yes sir.
Q. Were there any street lights in the area?
A. There might have been one or two. I think at least one, as far as I know of.
Q. Tell me, did you recognize Mr. Marshall as being the man- ...

(That was objected to by Mr. Rosenblum)

Q. You say you recognized Donald Marshall on Byng Avenue when he came up and talked to you?
A. Yes.
Q. What was he wearing?
A. Yellow ...
Q. When Marshall caught up to you on Byng Avenue - I'm sorry, did you give us what he said? 'Look what they did to me' - did

" he say anything else?
A. He said that his buddy was over at the park with a knife in his stomach.
Q. Then you say, sir, that Marshall flagged down a car and you went where?
A. Over to Crescent Street on the other side of the park.
Q. Back to Crescent Street?
A. Yes.
Q. Is this in the area in which you marked an "X" on exhibit 5?
A. Yes.
Q. What did you find there?
A. There was a fellow keeled over on the street. He was laying down on the street. It was on this here street on the side where the tracks was at.
Q. Tell me, how long would this be after you saw the man keel over that you mentioned, before you ran from the scene? How much time would have passed?
A. About ten minutes, fifteen minutes.
Q. What did you do?
A. I got out of the car, ran over to where the fellow was lying on the ground and jumped down beside him.
Q. Did you recognize that man?
A. No sir.
Q. You didn't know him before?
A. No.
Q. What took place?
A. Well Donald Marshall got out of the car and come over near the body and at that time, he stood there for a minute; another fellow came over - I don't know if he or the other fellow went up and called the ambulance -
Q. Where did Marshall go when he came back? Did he go near the body?
A. No.
Q. Where did he stand?
A. He stood behind the body for a minute and then he flagged a cop car down. ..."

It was at that point that you gentlemen were excluded. Later on, before you, Chant on answer to a question from me, said, this time it is according to my own notes - remember you have to take your recollection if what I have noted in my notes is different from your recollection - according to my notes, Maynard Chant said, "the clothing worn by the accused whom I saw and to whom I talked after the incident on Prince Street was the same clothing as that worn by the man whom I saw pulling out a long shiny object which I thought was a knife."

Now you will remember, Mr. Foreman, that Maynard Chant said before you when he was talking about the fellow who hauled something out of his pocket -"maybe, I don't know what it was"- he said, "I don't know what it was." Because of that, the Crown counsel, Mr. MacNeil, because of that and some other answers that he gave, Crown Counsel requested that Maynard Chant be declared adverse and that he, Crown Counsel, be given the right to cross-examine. I will read you s.9(1)bf the Canada Evidence Act -

> "9.(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such a statement."

I ruled that Mr. Chant was adverse and I permitted the Crown to cross-examine him in the case. He was questioned on what he had said in the Court below and I will just refer you to that. He was questioned,

"Q. Tell me, what did you see take place?

A. The only thing I saw - I saw them talking. I guess they were using kind of profane language. Donald said something to the other fellow and the other fellow said something back to Donald and I saw Donald haul a knife out of his pocket.

Q. That's Donald Junior Marshall who you see in court here today. Would you point him out to the court, please?
Witness points to the accused.
You saw him what?

A. Haul a knife out of his pocket.

Q. What if anything did he do with the knife?

A. He drove it into the stomach of the other fellow."

Now I should read you also what should be the instruction of the judge to the jury in such a case and such a situation. The word adverse - I had to find him adverse - means hostile, not simply unfavourable. Once a witness is declared hostile and cross-examined upon a previous statement, the jury should be instructed - which I

am doing to you - that they are only to consider the previous statement in relation to the witness's credibility and not as relevant to the proof of any fact in the case, unless adopted - unless adopted. In other words, you ask a witness - the witness says something today and you draw to his attention that he made a statement that was inconsistent with what he is saying today, and he agrees, he acknowledges that he made an inconsistent statement, you only look at that previous statement to determine whether or not this witness is a credible witness. You do not accept the statement that he made previously as being the truth. You look at it for the purpose of deciding whether or not such a fellow can be believed, a fellow who says something one day and something else the next day. But the law is too, that you can accept what he said before if it is adopted by him. Now my recollection is, and you will go by your recollection, not mine; my recollection is that when Mr. MacNeil was cross-examining him and reading from the prior testimony, he would ask him a question, "did you say such and such," and the witness said, "yes." "Is it true," and the witness said "yes," and the same right along. Now that's my recollection. You will, of course, take your recollection of that question and answer. My recollection is that he adopted here before you the previous statements that he had made in the court below. But the main attack on Mr. Chant's testimony by the Defence is twofold. First of all, he failed to tell the police at the time of the incident what he told the court here. He failed to tell it that night. Secondly, he lied to the police and he said that in cross-examination according to my notes. He said that, "They, the police didn't tell me what to say." This was on cross-examination of Maynard Chant. "I told them the untrue story Sunday afternoon. I told them the true story afterwards." I think the criticism strictly speaking is justified. Strictly speaking, it's justified. It's a fair criticism to make, that he failed to tell the police at that particular time when he saw - when the police came, he didn't say, "There's your man who did this thing." He didn't say it there at the scene. He didn't say

it at the hospital. He didn't say it at the police station. He didn't say it later. How much more credible would have been his story if indeed he had told that story at the time it happened. And he lied to the police for a while. He said they didn't coerce him into telling the story. He later told them the true story. Mr. Rosenblum says, "you can't believe a thing that this fellow says." Mr. Foreman, he says you can't believe - the Defence urges you to disregard the evidence of Maynard Chant, because of his inconsistencies and because of the fact that he lied and he didn't tell the story at the time.

Mr. MacNeil, on the other hand, urges you to accept his story completely as finally told. Well I told you before that it is up to you to assess the credibility of every witness. You don't have to believe everything a witness said. You can believe a part; you can believe some; you can reject - you can disregard the whole of that witness's testimony. It is up to you to determine the credibility of the witness and, of course, in this case you will have to be, in my opinion, I would instruct you, to be most careful of the evidence. You are looking at his evidence and you have to be most careful. But in assessing his evidence, Mr. Foreman and gentlemen, you will keep in mind the circumstances in which this boy came to be there that night. He had been to a church meeting in the Pier I think. He missed his ride. He came over town to try to get a bus to go to Louisbourg, his home, and he was too late for the bus. So he started to walk from the bus depot, down in this direction, presumably to hitch-hike a drive to his home in Louisbourg. Then he becomes involved, becomes a witness to a very serious matter - becomes a witness to a very serious matter. In discussing his testimony, you will ask yourselves, did Maynard Chant exhibit the tendency that as reasonable people you might feel many people would have of desperately not wishing to become involved in a very serious matter. You will keep in mind the age of this boy. You will ask yourselves what possible motive, what motive, would Maynard Chant have, in telling

the story implicating the accused, Donald Marshall. It seems to me - now, that's my opinion and I caution you, you do not have to accept my opinion; you do not have to accept my opinion. In my opinion there is not the slightest suggestion in this case that Maynard Chant was in collusion with John Pratico, that they acted in cahoots, together, to concoct a story. There's not the slightest suggestion that these two people were anywheres near one another prior to the events of that night or around that time up to the time when Chant saw Pratico, and that afterwards they got together to tell a story implicating the accused, Donald Marshall, Jr. He says that he saw Marshall and this other man arguing. Pratico said that they were arguing. He said, what he said here first, that he saw him haul out something; later he acknowledged it was a knife or as he put it, "he hauled out something which I thought was a knife, something shiny." Pratico said the same thing. Is he a liar? Or is there some consistency in his story which in spite of the events which were properly laid before you, he was declared adverse - is there something there which can lead you to consider that he is a credible witness. It is up to you, gentlemen. I am just putting the picture before you.

Now we come to John L. Pratico. And again, I read from the official record. Again in the direct examination -

"Q. Do you know Donald Marshall Jr.?
A. Yes sir.
Q. Do you see him here in court today?
A. Yes.
Q. Would you point him out to the court, please. Let the record indicate the witness points to the accused. Did you see him on the 28th day of May, 1971?
A. Yes.
Q. Where?
A. By Wentworth Park.
Q. And where did you first see him that evening?
A. Up by St. Joseph's Hall.
Q. Up by St. Joseph's Hall?
A. Around that area.
Q. Who was with him?
A. Sandy Seale.

"Q. Did you know Sandy Seale?
A. Yes, I did.
Q. Tell me, Mr. Pratico, what did you do when you joined up with Seale and Donald Marshall Jr.?
A. Walked down the road as far as, like around the park.
Q. Do you know the streets in the city of Sydney?
A. Yes.
Q. There's a drugstore there on what corner?
A. Corner George and Argyle.
Q. George and Argyle. Tell me, sir, what took place there if anything?
A. They went down in the park. I went the other way.
Q. Which way did you go?
A. Argyle to Crescent.
Q. You went up Argyle Street to Crescent Street?
A. Yes sir.
Q. Then where did you go?
A. I went over Crescent, down Crescent Street, as far as the railway tracks, there on the railway tracks and went up behind a bush and I stayed there and I went and sat down in a squat position, kind of behind the bushes where I was sitting.
Q. What time of the day or night would this be?
A. I wouldn't know.
Q. I beg your pardon.
A. I wouldn't know. What I'm thinking, it would be 11:30, quarter to twelve. I wouldn't know for sure.
Q. What were you doing behind the bush?
A. Drinking.
Q. Tell me, sir, what did you observe if anything?
A. Well soon as I observed Donald Marshall and Seale talking, it seemed like they were arguing -

(I told him, "I can't hear you" and he repeated it. "It seemed like they were arguing.") By Mr. MacNeil -

Q. Where was this?

(You understand this is all Mr. MacNeil's questioning. This is direct examination.)

A. On Crescent Street.
Q. I'll show you plan, exhibit No. 5. Are you familiar with this plan?
A. Yes.
Q. Would you point out please where on the exhibit 5 that you saw the two gentlemen?
A. There ...
Q. You'll have to speak up loud now.
A. This would be the drugstore here-
Q. Louder, please?
A. I went down this way here.
Q. Down Argyle Street?
A. Down Argyle to Crescent and come up here and stopped around here.

"Q. Stopped in the area marked "X" on the plan?
A. In that area.
Q. Stopped in the area marked "X" on the plan. (Plan shown to the jury.) Tell me, before this evening did you know Donald Marshall?
A. Yes.
Q. How long did you know him?
A. Known him ever since last summer.
Q. Did you know Sandy Seale?
A. Yes sir.
Q. How long did you know Sandy Seale?
A. A couple of years.
Q. When you got behind the bush you say you were at in the park there, that you pointed out at approximately the point marked "X" on the plan, what did you observe if anything?
A. I seen Sandy Seale and Donald Marshall talking, more or less seemed like they were arguing.
Q. Did you recognize them at that time?
A. Yes.
Q. Were there any street lights in that area?

(There was no audible response.)

Q. Take your hand down.
A. Yes sir.
Q. And you could recognize them at that time?
A. Yes.
Q. What if anything did you see them do?
A. Well they stood there for a while talking and arguing and then Marshall's hand came out, his right hand coma out like this-
Q. What do you mean, out this way?
A. Come out like that you know and plunged something into Seale's like it was shiny and I-
Q. Pardon me. You're confusing me. The hand came out of his pocket and you said something about shiny. Now how does that connect in there?
A. Well it looked like a shiny object. Come out this way, you know.
Q. What did he do with the shiny object?
A. Plunged it towards Seale's stomach.
Q. Into whose stomach?
A. Seale's.
Q. What did Seale do?
A. He fell. And that's the last I seen.
Q. What did you do?
A. I started running. I ran up Bentinck Street."

Now in cross-examination and this time, again according to my notes - you remember, according to my notes - that's my notes - you take your own recollection; you do not have to go by my notes - according to my notes, Pratico said in cross-examination, "Only two I noticed were Seale and Marshall. Seale was facing me. Marshall facing the other direction. They were standing at arm's length."

Now Mr. Foreman, the Defence understandably attacks Mr. Pratico's evidence because of his drinking which he related, the extent of which he related to you that night and because of the fact that he, Pratico, told other people that Donald Marshall did not stab Sandy Seale. You are pretty well aware now from what was brought before you of the incident that occurred outside here in this very court house. You saw John L. Pratico on the stand. You heard his testimony and you saw his demeanour. And as I said before and repeat, it is up to you, you are the judges of the fact and you alone must decide the credibility of the witnesses. I may say that He was a nervous witness. That's my opinion. You don't have to accept that. He was a nervous witness. There's no doubt about that in my mind. And he explained why at times he had told the story that Donald Marshall did not stab Sandy Seale. His explanation was, "I was scared of my life; I was scared of my life." He had spoken to a man by name of Christmas he told you. He had spoken to a man by name of Paul - Artie or Arnie, I don't know; I've just forgotten, Artie Paul. He spoke to a woman too but he did say that there was nothing as far as this woman was concerned. He had spoken to Christmas, to Artie Paul and the day of the incident, he spoke to Donald Marshall Sr., the father of the accused, after which he approached Mr. Khattar one of the defense counsel who very properly and correctly in accordance with the best tradition, would not talk to him unless there was somebody there as a witness. He told Mr. Khattar, brought the sheriff out, that Donald Marshall did not stab Sandy Seale. Why did he tell that story? He said, "I was scared, scared of my life." "I was scared, scared of my life." That's what a witness tells you here in this court. He drank that night, disgracefully - drank

disgracefully. It certainly is a sad commentary on the authorities in this community that a young man of that age would be able to arrange to have liquor from the liquor store or wherever he got it. He drank wine and beer and whatever else he could get his hands on. In determining his credibility, however, you must ask yourselves - you will ask yourselves, and you are the judges, as you will in assessing the evidence of Maynard Chant, what motive - what possible motive could this young man, Pratico, have to put the finger of guilt on the accused, Marshall. What motive would he have? What motive would Maynard Chant have to say what he said here in court to you that Donald Marshall was the one who stabbed Sandy Seale? He was asked for example, "Where did you see Marshall first that evening?" He said, "Up at St. Joseph's Hall." The accused - and I will come to the accused's testimony later - read you his testimony too - the accused said he was not in the vicinity of St. Joseph's Hall. John L. Pratico said, "I saw him first that evening up by St. Joseph's Hall." Who was with him? Sandy Seale! The accused said Sandy Seale was with him. Later Pratico said that he noticed only the two and they were arguing. Chant said the same thing, the two, and they were arguing.

At one time, and this is my recollection and you need not take it; you will rely on your own - my impression is that Pratico said at one time that Seale had his fists up. They were arguing and Seale had his fists up. That's the impression I got. I think it's right but you will rely upon your own.

Now Mr. Foreman, the defence in this case is not self-defence. This is not a case of self-defence. This is a complete denial. The defence is, I didn't do it - complete denial! Not self-defence but even if it were self-defence, I would have to instruct you that if that were the evidence, the late Mr. Seale put up his fists, then to strike him with an instrument and stab him was something that would go far, far beyond the right of self-defence. That sort of defence would not be commensurate with the

other man's act. That issue does not arise here because as I said, the defence here is a complete denial. Pratico said that they were arguing. Chant said they were arguing. Pratico told of the shiny object in Marshall's right hand which he plunged into Seale's stomach. The other man said the same thing. What motive would lead this young man to concoct a story, a dreadful story if untrue, to place the blame of a heinous crime on the shoulders of an innocent man? What possible motive would Pratico have to say that Donald Marshall stabbed Sandy Seale? He had been drinking. In assessing his evidence you will have to ask yourselves, is this a drunken recital or is it a recital of a drunken man, or is there a consistency which appears between the story of two eye-witnesses that night to this tragic event, eye-witnesses as to whom there is no evidence by the Crown that they got together, were in collusion to concoct the story.

I said to you before that that's the main case of the Crown. They also have Patricia Ann Harris. Patricia Ann Harris, a young girl; she said there was someone with the accused. Remember, she is the young lady who was with her companion, Terry Gushue and coming from the dance. They stopped for a smoke in the bandshell. She says there was someone with him, with the accused. "I saw someone else there." One person! "I don't know who that person was." She says that Junior, the accused, held her hand that night. By the way, that's according to my notes. Again I caution you, you don't have to take my version. You will decide and again from my notes, and again I caution you, according to my notes, Terrence Gushue said that it was about ten to eleven when they were on Crescent Street going towards Kings Road where Miss Harris lives. They met Junior Marshall and he borrowed a match; Junior spoke to Patricia for a moment. According to my notes, Gushue said in cross-examination that he saw him, the accused, by the Green apartment building. This was on Crescent Street. "I saw just one with him", he said. Then he was pressed in cross-examination, properly checked, and he said,

"I thought there was only one" and he ends up, "I think there was only one." Patricia Harris says there were two people there. Gushue says there were two people. Maynard Chant says there were two and so does John Pratico.

That in essence is the case for the Crown, Mr. Foreman and gentlemen.

I come now to the evidence of the accused. I'm coming pretty close to the end. I'm not going to keep you all day, Mr. Foreman. I'm coming close to the end of my charge. Once again I have the direct examination, word for word, from the record as given here in court. He was questioned by defence counsel -

"Q. ...Had you been drinking on May 28 while you were at the home of Tobin's?

(I have left out a few preliminary questions.)

A. No.
Q. Where did you go after you left Tobin's home?
A. Down Wentworth Park.
Q. Were there people in the park?
A. Yeah.
Q. Did you meet anybody in the park?
A. Sandy Seale.
Q. Did you have any argument with him?
...
Q. What happened when you met Sandy Seale?
A. We were talking for a couple of minutes and Patterson came down-
Q. You met a fellow by name of Patterson?
A. Yes.
Q. What condition was he in?
A. Drunk.
Q. What happened then when you met Patterson?
A. Sat him on the ground. And went up to the bridge.
Q. Who went up to the bridge?
A. Me and Seale.
Q. You and Seale walked up to the bridge?
A. Two men called us up to Crescent Street.
Q. Two men what?
A. Called us up Crescent Street.
Q. What happened when you met these two men up there?
A. Bummed us for a cigarette.
Q. Pardon.
A. A Smoke.
Q. What about?
A. Asked for a cigarette and a light.

"Q. When they asked you for a cigarette and the light, what did you do?
A. I gave it to them.
Q. Go ahead.
A. I asked them where they were from. And they said Manitoba. Told them they looked like priests.
Q. You told them what?
A. They looked like priests.
Q. Why did you make that remark to them?
A. Looked like their dress.
Q. How were they dressed?
A. Long coat.
Q. What colour?
A. Blue.
Q. What religion are you yourself?
A. Catholic.
Q. So when you asked them if they were priests did you get an answer?
A. Yes.
Q. What did you say to these men?
A. They looked like priests.
Q. Did you get an answer to that?
A. The young guy, the younger one said, 'We are'.
Q. Go ahead.
A. They asked me if there were any women in the park. I told them there were lots of them down the park. And any bootleggers - I told them, I don't know.
Q. Take your hand down, Donnie and go ahead.
A. He told us, we don't like niggers and Indians.
Q. I didn't hear you.
A. We don't like niggers and Indians. He took a knife out of his pocket.
Q. Who did?
A. The older fellow.
Q. What did he do?
A. Took a knife out of his pocket and drove it into Seale.
Q. What part of Seale?
A. The side here.
Q. Are you referring to the stomach?
A. Yes.
Q. And then?
A. Swung around me, and I moved my left arm and hit my left arm.
Q. Hit your left arm?
A. Yes.
Q. Roll up your sleeve -

(And he did and you recall he showed the scar to you gentlemen of the jury.)

"Q. After that happened, what did you do?
A. Ran for help. ..."

I recall, I don't know whether it was - I think you can take it that Mr. Rosenblum asked him, "Did you lay a hand - did you do anything to Sandy Seale that night" and the answer was, "No."

Now gentlemen, you have to give very careful consideration to the story of the accused. I'm sure you will. As was his absolute right, he has gone on the stand and has given his version of the events that took place on that fateful night. Now contrary to what Pratico said, he said he was not in the vicinity of St. Joseph's Hall. And although he was with Mr. Seale, he had no dispute with him - those are the words I think - and he did not lay a hand on him. I repeat, he had no dispute with him and he did not lay a hand on him. And he told you how Seale came to get the injuries that he did receive. And I remind you, Mr. Foreman, that although the accused was subjected to a very vigorous and rigorous cross-examination, he adhered to his story that he told throughout. Now if you believe the version of the events that was told by Donald Marshall Jr., then it goes without saying that you must acquit him of this charge. Having gone on the stand he has become another witness in this case. You have the right to determine the credibility of him as a witness as you have the right to determine the credibility of any other witness. But you will bear in mind, Mr. Foreman - and I repeat, you will bear in mind - that Donald Marshall does not have to convince you of his innocence. He does not have to convince you of his innocence. It is the Crown, as I said over and over again, that must prove his guilt beyond a reasonable doubt. He does not have to convince you of his innocence!

The Crown, of course, understandably, has attacked this story. There was some considerable discussion among counsel as to the nature of the wound that he had on his left arm, the depth of it, whether there was bleeding. Mrs. Davis said there was no bleeding, it's true. The doctor at the time - but Maynard Chant said that

at first there was no bleeding but later there was bleeding. You saw the mark on his arm there. It's a pretty prominent mark even today after a number of months. In assessing his evidence, it seems to me - this is my opinion and you do not have to take my opinion - you have to look at it in two ways, it seems to me. On the one hand you keep in mind the fact that he stood up, as I said before, to a very rigorous cross-examination by a very capable crown prosecutor. You will bear in mind that he at the time showed Maynard Chant, "Look what they did to me." It was then and there at that time he told Chant what was done to him. At that time he managed to stop a car and got into a car and went back to Crescent Street. I think it was Maynard Chant - your recollection would be better - who said that it was he, Donald Marshall, the accused, who flagged down a police car. And it was Donald Marshall who went to the hospital and to the police station with the police. I think you have to ask yourselves on the one hand, is that the action of a man who has just commited a crime, who will flag down a police car, who will go with the police, who will do the things that he did and who maintains the consistency of his story. Keep in mind, as I said, that he does not have to prove his innocence.

On the other hand, Mr. Foreman, gentlemen, on the other hand - in my opinion, you will have to assess very carefully the story that he told - two strangers who he says looked like priests, because they wore long coats and blue. He asked them, he said, whether they were priests and one of them said they were and said they were from Manitoba. They asked for cigarettes, smokes; they gave him the smokes. He and Seale gave smokes to these people, or he did. Then the man, one of those men asked him if there were any women and they said yes, there were lots of them in the park. And out of the blue comes this denunciation against blacks and Indians: "I don't like niggers and I don't like Indians."

Now Mr. Foreman and gentlemen, we all know that prejudice has been rampant in this world for many, many years. We hope and pray that in our country we have reached a time in the progress of

our country that the hatreds and the bigotries and the suspicions of the past will no longer be with us and it seems that there is great hope in the youth of the country today who mingle and get to know more and more about one another. But that there still exists discrimination and bigotry and hatred for different ethnic groups, religions - there are those who do not like the blacks, or the Indians or the Catholics or the Jews, or the Protestants, or the Greeks, and so on - but in assessing the evidence of this witness, the accused, you ask yourselves the question, it seems to me, my opinion, at that hour - at that hour - these two men, one of them comes out suddenly with this denunciation of blacks and Indians. If you come to the conclusion that yes, it could be that there might have been somebody there that night who had that prejudice in him against - as he put it - niggers and Indians, you have to go on and ask yourselves the question, why - why. Donald Marshall and Sandy Seale who met these two strangers, who gave them cigarettes, smokes, who talked to them in a friendly way, asked them where they were from - according to Mr. Marshall's, the accused, story - where they came from; told they were from Manitoba; what were they, they were priests. Why, without the slightest gesture, without the slightest verbal attack or physical gesture, without the slightest provocation, would one of these so-called priests take out a knife and make a murderous attack on Sandy Seale, and on the accused himself. Why, one would ask in assessing the credibility of the story that he told, keeping in mind at all times that there was no obligation on him to tell anything at any time. There is no obligation on an accused person to say anything, to prove anything. But he has gone on the stand, has given the story and you have the right to judge the credibility of the story and keeping in mind at all times that the burden - the burden - of proving that he was guilty beyond a reasonable doubt must lie upon the prosecution.

Mr. Foreman and gentlemen, I have taken a long time in this case. I have humbly tried to discharge my duty in this proceeding. This has been a tragic event in the life of our communities here in this Island of Cape Breton, a tragedy that is beyond description. A young man in the prime of his life has been swept to eternity; a young man is on trial for that charge. We have to discharge our duty, Mr. Foreman; our duty in accordance with our oath that we have taken, you and I, before God to give to this case our fullest attention and ability, the ability that we possess. I have tried humbly to discharge the onerous responsibility that rests upon the judge. I know that you will discharge yours. I know that you will discharge yours. No matter who an accused person is in this country, be he the poorest or humblest citizen or be he the richest and most powerful individual in the country, any person charged with an offence will and must be given a fair and impartial trial without any sympathy, without any misguided sentimental feeling but one that is based on the evidence and on the evidence alone and with the proper application of the law as given by the judge. The oaths you have taken, each of you, is that you will well and truly try, and true deliverance make between Our Sovereign Lady the Queen and the prisoner at the bar, so help you God. Mr. Foreman and gentlemen of the jury, I am satisfied that you can be relied upon to discharge this heavy duty conscientiously and to the fullest.

(12:35 P.M. CONSTABLES SWORN)

Now from this moment on you gentlemen must remain together. Lunch will be provided you by our very capable sheriff and his assistants. You will come back to your room. You don't have to come back here. You will go directly to your room. All the exhibits will be given to you. The constables will be at your constant attendance. Again, should you wish any of the evidence read over to you or played back, you will indicate, send word to me. I hope that I have covered all the legal points but if you wish me

to touch upon any matter of law again, be free to do so, Mr. Foreman and gentlemen. Now you don't enter into any discussion with the constable. You merely say, "I wish to have something to say." You say it in court. If you want further instructions or anything you come in and ask me.

I can only apologize for the length of time but I think you will perhaps be the first to say in this serious matter, no apology from me is necessary. I want to thank you, each and every one of you, again for the care that you have given to the whole case.